

103  
**THE ENDANGERED SPECIES ACT**

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Y 4.M 53:103-27

**RING**

The Endangered Species Act, Serial... RE THE

COMMITTEE ON ENVIRONMENT  
AND NATURAL RESOURCES

OF THE

COMMITTEE ON  
MERCHANT MARINE AND FISHERIES  
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

CONSTRUCTIVE DEBATE ON THE REAUTHORIZATION OF  
THE ENDANGERED SPECIES ACT

MAY 27, 1993

Serial No. 103-27

Printed for the use of the Committee on Merchant Marine and Fisheries



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# THE ENDANGERED SPECIES ACT

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THURSDAY, MAY 27, 1993

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES, COMMITTEE ON MERCHANT MARINE AND FISHERIES,

*Washington, DC.*

The Subcommittee met, pursuant to call, at 10:09 a.m., in room 1334, Longworth House Office Building, Hon. Gerry E. Studds [chairman of the Subcommittee] presiding.

Present: Representatives Studds, Hochbrueckner, Pallone, Unsoeld, Reed, Furse, Hamburg, Lambert, Eshoo, Saxton, Young, Gilchrest.

Staff Present: Jeffrey Pike, Tom Kitsos, Sue Waldron, Gina DeFerrari, Lesli Gray, Leigh Clayton, Dan Ashe, Harry Burroughs, Cyndi Wilkinson, Laurel Bryant, Margherita Woods, JayneAnne Rex, Tom Melius, Eunice Groark.

## OPENING STATEMENT OF HON. GERRY E. STUDDS, A U.S. REPRESENTATIVE FROM MASSACHUSETTS, AND CHAIRMAN, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

Mr. STUDDS. The Subcommittee meets this morning to take a look at the workings of the Endangered Species Act. Twenty years ago, Congress enacted this landmark environmental law in response to concerns over the growing number of species lost to economic growth and development. In the last two decades, much to the Act's credit, we have witnessed increasing success in the battle to protect species: the bald eagle, the gray whale, the peregrine falcon, the whooping crane are only a few of the species which have benefited from the protection of this Act.

This protection is not without controversy, and it is often portrayed as "endangered species versus people." Just how wrong that characterization is was made clear by the recent discovery of a tree in Malaysia that held promise for the treatment of AIDS. A team of collectors returned to the site to harvest additional material for testing and discovered that the tree had been cut down. They were unable to find another.

What appeared to be a tragic example of the disappearance of a species of enormous value to medicine, thankfully, now seems to have a happier ending. Very recently another tree with similar characteristics has been found. But I know of no story that more dramatically illustrates the importance of humbly protecting species, which very simply is if we keep them alive, they may be able to return the favor.



This Committee is responsible for reauthorizing the Endangered Species Act, and it should prove to be one of the most riveting environmental debates we have in this Congress. My own goal is to enact strong legislation that effectively keeps species from being pushed, falling, or otherwise disappearing over the edge and to help prevent species from becoming endangered in the first place.

To engage in a constructive debate on the reauthorization and the controversies associated with it, it is essential for this Subcommittee to have a thorough grasp of the nuts and bolts of this law. Thus, today, we will receive an Endangered Species Act 101 course from the agencies responsible for overseeing the Act, the Fish and Wildlife Service and the National Marine Fisheries Service. There will not be a test at the end of this session, but the final exam will require some work.

At this time, the Administration does not have a position on ESA legislation, and, therefore, the witnesses will have to defer questions about the merit of specific amendments or proposals. They can, however, describe the intricacies of the Act, explain where it is flexible and where it is not, how a critter gets listed and delisted, and talk about how specific issues have been resolved in the past.

This is the first of several hearings the Subcommittee will hold on the Act. A second is scheduled next month on habitat conservation plans, and two field hearings will be held in July, one in Texas and one in California. A potential cure for AIDS; a treatment for breast cancer—who knows what other miracles may be hiding amongst the species that populate our forests, our oceans, and live elsewhere on this planet? It is our job to preserve the opportunity to discover these miracles. To succeed, we need a strong Endangered Species Act, and we begin work toward that goal today.

Let me advise members and anyone else that this literally is 101. This morning is nothing but the nuts and bolts of the Act as it is currently constituted and as it has been enforced and administered in recent years. This is more history than histrionics. So if anybody is waiting for the latter, this is premature.

Mr. STUDDS. Speaking of histrionics——

Mr. YOUNG. Yes?

Mr. STUDDS [continuing]. and restraint and venerability, the distinguished gentleman from Alaska.

#### STATEMENT OF HON. DON YOUNG, A U.S. REPRESENTATIVE FROM ALASKA

Mr. YOUNG. Thank you, Mr. Chairman. And may I say that yourself and myself—that is probably incorrect—were the ones that worked on this in this Committee in 1973. One of the first Acts that we passed in 1973 was the Endangered Species Act.

Mr. STUDDS. We were one of the first creatures listed as well.

Mr. YOUNG. And we are still there, not like the bald eagle or the peregrine falcon or the gray whale.

Mr. STUDDS. Never mind the bald part.

Mr. YOUNG. I was trying to be very kind today so——

Mr. STUDDS. Thank you.

Mr. YOUNG. I would suggest, Mr. Chairman, this is going to be a process in the day as 101, but we also have to understand that this



issue probably has raised its head—the Endangered Species Act—more in the last five years than any other time. With the spotted owl and the redheaded woodpeckers and all the other creatures that have caused disruption, loss of jobs, and economic strangulation, there is now a feeling in the public, yes, they wish to protect, but they do not wish to protect exclusively when it affects the welfare and well being of the human being.

Now, those who will disagree with me, it is my intent—and I know when we passed this Act, the intent was to protect species, to make sure that they are not extinguished like the homing pigeon, et cetera, but there are interest groups that pressure the professionals, professionals in the Executive Branch of whatever Administration, without understanding that is, in fact, that species endangered or is it endangered in a locale?

I will give you an example—the snail darter on the Tellico Dam. That was never endangered. Over the mountain, you could buy 50 million of them, but it held up a dam for 11 years because of the Act. And I think that has to be addressed. We have the peregrine falcon in Alaska which is a classic example that is in excess. Now I am having a hard time getting it off the list, and yet there is an abundance of peregrine falcons. And the effect upon areas in activity of my citizens is very evident.

And we can go on into the sockeye salmon on the Columbia River. Is it endangered or is it not endangered? Now, the scientists will tell you that it is endangered because this is a specific species. That is not true. It is specific only in their eyes but not in biological research or scientific fact. Yet, it is, now we are draining the Columbia River, loss of jobs, loss of opportunity, the loss of food to this nation.

We have the spotted owl that has caused more concern and more anguish and more depression. And yet that owl itself is not endangered. In fact, at one time, it was said there was no possibility that it would be endangered. Sure, we don't see them. Well, you are not supposed to be out that late anyway.

Mr. Chairman, I am going to suggest that there ought to be a working ability here and a communication to solve the problem because when I voted for this Act, I expected it to be implemented but not to be extended beyond the point of realistic human activity. And I am one who still believes very strongly that we cannot divorce ourselves from the environment or any law we pass. And when anybody is, very frankly, shortsighted to think they can do so is not really looking down the road.

You will destroy the environment if you don't recognize man's role and his future because we are here whether you like it or not, and we will continue to grow. Our opportunity to use our mind is to manage to make sure that there is no damage that is permanent, but when you go to the extremes, you create a reaction that can destroy what you are trying to protect and what I am trying to protect.

So I think it is very vital, Mr. Chairman, we reach a balance in this discussion because I can tell you if we go too far like some people have suggested that we have to have a total ecosystem environmental study so we make sure that nothing ever happens again—we don't care if we lose 50 or 60 million jobs—it doesn't

make any difference—we must protect that hooted owl or the red squirrel or the spotted squirrel, the subspecies which we are speaking of which has nothing to do with this Act.

So, Mr. Chairman, may I suggest I compliment you on this hearing, and I hope we can progress and accomplish something that will take care of those we wish to protect and recognize the human factor. Thank you, Mr. Chairman. And, Mr. Chairman, I ask unanimous consent to submit Jack Fields's statement at this time.

Mr. STUDDS. Without objection.

[Statement of Mr. Fields follows:]

STATEMENT OF HON. JACK FIELDS, A U.S. REPRESENTATIVE FROM TEXAS, AND  
RANKING MINORITY MEMBER, COMMITTEE ON MERCHANT MARINE AND FISHERIES

Mr. Chairman, thank you for holding this hearing today. The reauthorization of the Endangered Species Act is one of the most important tasks before this Committee. We need to move carefully, yet expeditiously, toward improving this powerful and far-reaching environmental law.

In 1973, Congress approved the Endangered Species Act with the fundamental intent of protecting certain plants and animals from extinction, a very worthwhile goal. In the early years after its enactment, the ESA caused few disputes. However, that is not the case today. Even one who has never heard of the statute, has certainly heard of the controversies it has spawned involving the snail darter and the spotted owl.

Not many people in this country would consider it responsible to allow economic development to continue unfettered without consideration for threatened or endangered species. There would be a great public outcry if we were to ignore the well-being of the bald eagle, the grizzly bear, or the whooping crane. Yet, there must be a balance between protecting these precious species and protecting the rights of American citizens. The Endangered Species Act should not be used as a weapon to retard development in Texas and across the nation; it should be an act that achieves the goal of its originators, that of protecting plants and animals from extinction.

I have noticed that many people are confused by how the Act is implemented. For example, 1.5 million people wonder why their water rights are not given at least equal consideration as those of a one-inch fish. Others wonder why their property values have diminished due to the occasional presence of certain types of birds or other wildlife. And, then, there are those who wonder why we are not de-listing any species; why the Act is not working. Those are just Texans, I am sure many members have heard similar questions from their constituents. It is important that every member be familiar with the workings of the current law and the problems with its implementation so we can answer these types of questions.

This hearing will be very helpful in that educational process. I hope that members will listen carefully and ask questions so that when the time comes to actually approve an authorization measure, we will produce effective and balanced legislation. Congress not only has an obligation to protect endangered or threatened species; it has an obligation to protect the property rights of all Americans. We can have a strong endangered species act without forcing hard-working Americans to wonder whether they will have access to enough water, or whether they will be permitted to utilize their own property.

Thank you, Mr. Chairman.

Mr. STUDDS. Are there additional opening statements? The gentleman from California.

STATEMENT OF HON. DAN HAMBURG, A U.S. REPRESENTATIVE  
FROM CALIFORNIA

Mr. HAMBURG. Good morning, Mr. Chairman, and colleagues. Reauthorization of the Endangered Species perhaps more than any other public law sets the stage for reflection on the way that we as humans live in and upon our natural world. The Act is an acknowledgement that the unconscious use of natural resources and the manipulation of the natural world leads sometimes to irrevocable

consequences. Reauthorization of the Act requires us to answer the question of how much we are willing to forfeit in order to preserve a way of life developed in the short history of our nation in an incredibly diverse and rich natural environment.

Reauthorization of this Act requires us to look forward in time to choose whether we will change now or whether we will continue to impose change regardless of consequences. Earth, this world, our world is a resilient world. Change has been the consistent rule and the very reason that species have emerged, evolved, and some have also become extinct. Since prehistoric time, natural selection has sorted within and among species for characteristics that can adapt to change. But humans have developed the ability to create change at a tempo and on a scale that is fundamentally different in character. The Endangered Species Act reflects a determination to evaluate the effect of human-induced change.

The Act codifies our duties as the trustees of the natural world. Our duties as trustees do not arise through choice. Instead, they are forced on us as an inevitable consequence of the tremendous inequality of power on our planet and the awesome human ability to alter the natural world. The Act is based on the reality that our natural resources are exhaustible and in many cases are nearly exhausted. It recognizes that the astonishing range of life forms on earth has inherent value and that particular species have both inherent value and an unknown range of uses many of which we have not yet discovered.

The ESA embodies a conscious decision as a society to change, to stop, to reflect, to re-evaluate the way that we interact with the natural world. The Act is a first step toward treading more lightly on the land. It is a decision to look before we step, to look from the perspective of the species that are affected by us. Today's hearing is the beginning of a challenging and exciting process. I look forward to that process. I look forward to the testimony of the witnesses this morning. Thank you, Mr. Chairman.

Mr. STUDDS. Very well said. That is what the gentleman from Alaska was trying to say.

Mr. HAMBURG. Yes. I felt like we were just about exactly in sync so I just wanted to get that out of the—

Mr. YOUNG. The only difference, Mr. Chairman, I would suggest the gentleman made an excellent statement. Mine was a little more straight to the point.

Mr. HAMBURG. That depends on what you think the point is, sir.

Mr. YOUNG. I believe you will find out when this hearing is over I was correct in my position.

Mr. HAMBURG. I think we may not.

Mr. STUDDS. Time out. The only way out of this is to recognize the gentleman from New Jersey.

#### STATEMENT OF HON. JIM SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY

Mr. SAXTON. Mr. Chairman, thank you. I do not have a prepared statement, nor do I have a straight-to-the-point one like the gentleman from Alaska, but I would like to just make one observation before we start and that is while I came here this morning to listen



and learn, I have been doing some listening and learning on my own relative to this subject. And there is one inescapable conclusion that I draw and that is that this Act named the Endangered Species Act is quite misunderstood outside of the community of people who are immediately concerned with it, work with it, study it, and deal with it on a daily basis.

My constituents look to a large degree at this as a nuisance law which is intended to protect some things that they oftentimes do not believe are important whether it is red squirrels or spotted owls or snail darters in my part of the country or whatever species it is. And I believe—at least I have drawn the conclusion for myself that it is true, in part, because we refer to it as the Endangered Species Act when, in fact, it is a law which is not only intended to protect species which are endangered, but which also serves as an orange flag when something has gone wrong with habitat and habitat management.

And so perhaps what we need to focus on in this discussion and many discussions that will follow are not only emphasis placed on protecting endangered species but perhaps the Act itself should be called the Endangered Species and Habitat Management Act to put more emphasis here on something that I believe is really important. And so I just say that to let you know what my perspective is here relative to very serious conflicts that the gentleman from Alaska very articulately points out. Thank you, Mr. Chairman.

Mr. STUDDS. The gentleman from Maryland.

#### STATEMENT OF HON. WAYNE GILCHREST, A U.S. REPRESENTATIVE FROM MARYLAND

Mr. GILCHREST. Mr. Chairman, I apologize for being late. I especially apologize for being late because I didn't hear the gentleman from Alaska's remark, and I felt because of the enthusiasm of the room that I really missed something.

Mr. STUDDS. He gets better every time.

Mr. GILCHREST. I don't have any opening statement myself except that I think I would like to—I am not sure if I want to echo the gentleman of Alaska because I am not sure what he said, but Alaska is—I will take your word for it. I do want to echo the sentiment of the gentleman from New Jersey. I think there is a great deal of misunderstanding surrounding the purpose of the Endangered Species Act, and it is something that needs to be better understood by the American public not so because it is more politically palatable to be in favor of it for elected representatives, so that people simply understand where the human race fits into the niche of life on the planet and how the balance of nature provides for all of us on equal terms. So I look forward to the testimony, and I think we can pursue this all with an open mind. Thank you.

Mr. STUDDS. We are dangerously close to eloquence around here. I thank the gentleman. If there are no further opening statements, we will proceed with the panel. As I understand it, there has been an agreement amongst the five of you as to the order in which you will proceed and a remarkable negotiation to the effect that if we withhold our firm application of the five-minute rule, nonetheless between you, you will take more than 30 minutes. We will allow

you to divide the time, as you wish. We will start with Mr. Mike Spear, Assistant Director for Ecological Services of the Fish and Wildlife Service. Mr. Spear.

**STATEMENT OF MICHAEL SPEAR, ASSISTANT DIRECTOR FOR ECOLOGICAL SERVICES, UNITED STATES FISH AND WILDLIFE SERVICE**

Mr. SPEAR. Thank you, Mr. Chairman. I am pleased to be here today to speak about the Endangered Species Act. I have had experience not only with the policies of the Endangered Species Act from the Washington Office perspective but on-the-ground implementation. I have been the Assistant Director for Ecological Services for nine months. Prior to that, I was Regional Director in Albuquerque for the Fish and Wildlife Service for 10 years. As Regional Director, I was responsible for field operations in New Mexico, Arizona, Texas, and Oklahoma. As a result of that, I consider myself a practitioner of the Act.

Today, we will review with you the mechanics of the Endangered Species Act that answer questions on the process and procedures of the Act and to help you understand how the Fish and Wildlife Service and the National Marine Fisheries Service work to protect declining plant and animal populations of this country.

The Service is proud of the work done by our field offices in conducting status surveys, assessing threats, performing consultations, and pursuing recovery of endangered species. We have pursued new partnerships and stronger alliances with other Federal agencies and have strengthened our ties with the States.

We are increasingly including others in our process. We are encouraging public outreach and understanding, and this is going and beginning to improve the point that was made by the opening statements about the need for education. We believe this is underway now and is improving. The people—public is beginning to understand the benefits of species conservation.

After brief comments from my colleague, Pat Montanio of the National Marine Fisheries Service, John Fay, to my right, will perform the Endangered Species 101 course. Mr. Fay has worked in the Washington Office of Endangered Species for 15 years and has been involved in various reauthorizations, involved in various aspects of the Act, and currently is the Branch Chief for listing and candidate assessment. He will be presenting an overview of the Act and those sections dealing with the domestic protection of threatened and endangered species. Thank you, Mr. Chairman. I turn it over to Pat Montanio.

Mr. STUDDS. Thank you, sir. Then we will go to Ms. Patricia Montanio of the National Marine Fisheries Service. Welcome.

**STATEMENT OF PATRICIA MONTANIO, ACTING CHIEF, PROTECTED SPECIES MANAGEMENT DIVISION, NATIONAL MARINE FISHERIES SERVICE**

Ms. MONTANIO. Thank you. I am Pat Montanio, Chief of the Protected Species Management Division for the National Marine Fisheries Service. Also here for the agency are Phil Williams, who is

our National Sea Turtle Coordinator, and Karl Gleaves from our Office of General Counsel.

The National Marine Fisheries Service is responsible for implementing the Endangered Species Act with respect to most marine and anadromous species and share many responsibilities with Fish and Wildlife Service. Our Endangered Species Program has emphasized exploring alternatives that significantly reduce impacts to listed species while enabling a project's objective to be met.

Our Endangered Species Program is relatively small but has been growing in recent years in both numbers of species and in complexity of issues. We currently have responsibility for 23 domestic species including whales, sea turtles, and salmon. We have or are in the process of completing recovery plans for most of these species. With the recent salmon listings, the number and complexity of formal consultations under the Act have increased dramatically, and we expect this to increase over the next few years.

Currently, we issue about 100 biological opinions a year compared to less than 15 a year in the 1980's. And we continue to get an increasing number of petitions to list species or to list distinct populations and to designate critical habitat. Our program has also grown from a primarily reactive program to a more proactive one; proactive in terms of developing and implementing recovery plans but also in terms of prelisting actions. It is becoming increasingly apparent that early action is necessary to minimize economic impacts. The most cost-effective option is to begin actions before species decline to critically low levels.

For prelisting actions, efforts also include exploring existing authorities to avoid the need for listing and developing needed information. It is important that we establish a larger base of information to better understand the dynamics between species and ecosystems.

Now, John Fay and Phil Williams will provide an overview of the Act's major provisions with examples of how these things have been implemented by the agency. And then Karl Gleaves will discuss where and how economic considerations play into the Act's operation. I believe it is important to keep in mind that the Act contains considerable flexibilities in the processes that can be used to implement these requirements and objectives. Thank you.

[The joint statement of Mr. Spear and Ms. Montanio can be found at the end of the hearing.]

Mr. STUDDS. Thank you very much. Let me inject for one moment. If there is anyone who is unable to find a seat, especially anyone who needs to write, you are welcome to fill in around the lower dais here. Don't be bashful. Just come on and sit down even if you don't need to write. We proceed next to Dr. John Fay of the Fish and Wildlife Service. Dr. Fay.

#### STATEMENT OF JOHN FAY, CHIEF OF THE BRANCH OF LISTING AND CANDIDATE ASSESSMENT, ENDANGERED SPECIES DIVISION, UNITED STATES FISH AND WILDLIFE SERVICE

Mr. FAY. Good morning, Mr. Chairman.

Mr. STUDDS. You want to pull that mike very close to you please.

Mr. FAY. I am sorry. Good morning, Mr. Chairman, and thank you. I am very happy to be here this morning. I will attempt to be extremely brief in my comments. We have provided a written statement to the Committee which I will summarize, but I will only hit the high points in the interests of time, and it will be roughly in the order of the provisions of the Endangered Species Act as they appear in the statute.

And it is very important, I think, to keep in mind throughout the statement of purpose of the Endangered Species Act, and the principal statement of purpose is that it is intended to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved. It is now and always has been, I think, fundamentally an ecosystem-oriented Act and program.

Section 4 of the Act prescribes the listing process by which we identify species that are, in fact, endangered or threatened, and it is quite detailed. It includes provisions for petitions from the public that may trigger listings or, in fact, may trigger delistings as well. It sets specific deadlines for making findings for comment periods and for making final decisions on listings. And it also requires that listings be based only on the best available scientific and commercial information.

It also provides an extensive opportunity for public comment on proposed listings. We often receive hundreds or, in some cases, thousands of comments when we propose to list a species, and we hold public hearings as well. It is an extremely open process and properly so, I believe. The Fish and Wildlife Service has also attempted to go somewhat beyond the proposal and comment process with Notices of Review of candidate species, and we distribute annually thousands of copies of our candidate Notices of Review in part to attract comment and information from the public, from the scientific community, and from others who are concerned with the progress of our listing process.

Let me give you some current numbers, and we have a chart over here. As of right now, we have about 800 species listed. The number in 1980 was 283. We are projecting about 1,500 by the end of the century. We are dealing at the moment with about 3,500 candidates down from about 4,000 10 years ago, and we are expecting that to reduce somewhat by the end of the century to 2,500. At the current rate of listing and projected funding levels, we are talking about a substantial list by the end of the century within the United States, and I am confining this to domestic species.

Section 4 of the Act also covers the designation of critical habitat, and this is something that originally was a regulatory matter undertaken by the Fish and Wildlife Service in the mid '70's on its own initiative, and it was eventually adopted into the law. And critical habitat has been, as I am sure you are aware, a very controversial aspect of the Act particularly when boundaries include private lands. But I would point out that the effects of critical habitat designation extend to Section 7, which I will discuss in a few moments, and that is a section of the law that has its principal effects on Federal agencies and not on private interests.

I would also point out that although the boundaries of critical habitat in some cases are fairly extensive, the focus of the effects of critical habitat are always on the so-called constituent elements of



the habitat which include things like water quality, flow regimes, food, shelter, nest sites, post-species, pollinators—the actual biological needs of the species for which the habitat has been designated. And so the effects are not broadly applied throughout the mapped boundaries but rather to those constituent elements.

Section 4 of the Act also requires recovery planning which we consider a centerpiece of providing the conservation to list its species, and we have a chart here now that reflects the state of progress and recovery planning in 1980, at the present time, and our projection through the year 2000. We now have——

Mr. YOUNG. Will you pardon me? Young lady, will you hold that up so they can see it on that side too?

Mr. FAX. And we have approved recovery plans at this point for about half of the listed species. We are hoping to increase that proportion significantly by the year 2000, but in 1980, we only had 44 recovery plans.

When a plan is first adopted, it may focus largely on information needs. The point of having a species put on the list, there are often gaps in our knowledge of what is needed to bring about recovery, but we do revise these on approximately a five-year schedule. We incorporate new information. We attempt to respond to what we learn through further research. And we also and increasingly so in recent years have been focusing on recovery plans that address more than one species loosely referred to as ecosystem plans, and this is a general trend that I would also point out has been incorporated more and more frequently into the listing program as well.

But I think it is important to keep in mind that the recovery of an endangered species or threatened species is not something that happens overnight. Progress is measured over periods of decades, and so this is a long-term commitment in recovery planning.

I would also point out that the implementation of recovery plans is not a sole activity of the Fish and Wildlife Service or the National Marine Fisheries Service. We often anticipate the assistance and sometimes the principal activity of other Federal agencies, States, and other private interests.

Let me move on now to Section 7 which I think many people consider the heart of the Act and that is the interagency cooperation provisions. We conduct consultations under Section 7 with other Federal agencies. We have a chart here reflecting the general workload for the Fish and Wildlife Service in consultations, and it is quite substantial and has been growing, and we expect it to continue to grow.

Additionally though, Section 7[a][1] of the Act requires all Federal agencies to use their existing authorities to conserve listed species and to establish programs for the conservation of endangered and threatened species. And conservation, incidentally, is a term of art, and conservation is, in fact, defined in a way so that it is equivalent to recovery. So there is a positive aspect to Section 7 that goes beyond the results of consultation.

But Section 7[a][2], which is usually the focus of consultation, is the provision that requires Federal agencies to avoid jeopardizing listed species or adversely modifying or destroying their critical habitat and to go through consultation to ensure that they achieve those standards.

Section 9 of the Act contains the prohibitions that apply for listed species, and the prohibitions for listed animals are extremely comprehensive and come under the general heading of prohibition on take, and take includes harass, harm, pursue, hunt, shoot, trap, wound, and so forth. The farthest reach of that prohibition is probably contained in the word harm. The prohibitions that apply for endangered plants are considerably milder and largely extend to Federal lands and to supplementary enforcement of local jurisdictions.

A very active area right now has been the preparation and development of habitat conservation plans, and these are related directly to the prohibition on taking as it applies to local jurisdictions and private interests. And it provides a system that can provide for a single landowner or a regional association of developers, local governments, to carry out actions that would have the effect of incidentally taking endangered animals or threatened animals under the auspices of a permit—an incidental taking permit which, in turn, is issued on the basis of a habitat conservation plan that offsets any incidental taking that would take place.

I would also like to briefly mention Section 6 of the Act that we consider quite important, and this provides a mechanism for granting aid to States, cooperative funding of State programs, and many State programs have had a tremendous effect on endangered and threatened species in part through the funding of Section 6.

I think I will conclude my remarks there. I would be happy to participate in answering any questions that the Committee may have. Thank you very much.

Mr. STUDDS. Thank you, sir. It is not clear to me whether you want Mr. Williams or Mr. Gleaves to go next. What is your—

Mr. SPEAR. Mr. Williams will go next.

Mr. STUDDS. Mr. Phil Williams of the National Marine Fisheries Service.

#### STATEMENT OF PHIL WILLIAMS, NATIONAL SEA TURTLE COORDINATOR, NATIONAL MARINE FISHERIES SERVICE

Mr. WILLIAMS. Thank you, Mr. Chairman. I am pleased to be here on behalf of the National Marine Fisheries Service. I am the National Sea Turtle Coordinator for the Service. I am not here to speak only about sea turtles today although I would be pleased to answer your questions after our presentation. What I would like to do is follow up on some of Mr. Fay's presentation to give you some case studies, if you will, on this Endangered Species Act 101 course. My examples will concern salmon, sea turtles, sea lions, and harbor porpoise, and ways that we have worked to protect those species and meet our requirements under the Act.

If we move to Section 4 in the listing of species and use salmon as an example, in the Northwest, there are hundreds of runs of salmon each year, and listing each run, which is under consideration, could be prohibitively expensive and complex. To respond to this, we clarified the definition of species as it applies to distinct populations. We have developed a policy wherein we will consider a salmon stock to be a distinct population and, therefore, worthy of protection under the Act, if it is deemed an evolutionarily signifi-

cant unit. This means that only salmon populations that are reproductively isolated and which are determined to represent an important component in the evolutionary legacy of the species will be listed.

Because of the great interest in salmon protection in the Northwest and potential listing of species, we have modified our listing process somewhat to open it up even more so than normal beyond the public hearing process. We have developed this system to ensure that all views and available scientific information are considered. All scientific information and comments related to the listing process are placed in an administrative record which are available for public review.

The listing process includes a variety of teams which consider the nominations, includes a technical committee to comment on data, a biological review committee to conduct status reviews and to provide preliminary recommendations to the agency. These teams are comprised of scientists and managers from the States and Federal agencies, from Indian tribes, from public utilities and other interested parties, and all of their meetings are open to the public.

Another example of how we approach listing in the marine environment or how we perhaps try to avoid listing is the harbor porpoise in the Gulf of Maine. The National Marine Fisheries Service recently proposed to list this species as threatened because of its decline due to bycatch in the gillnet fishery in that region.

However, before actually listing the species, we have requested the New England Fisheries Management Council to take action under the Magnuson Fishery Conservation Act to reduce harbor porpoise captures. That council is now developing a multifishery management plan in this region to reduce gillnetting which will benefit dwindling stocks of groundfish and have the benefit of reducing harbor porpoise takes also.

Continuing on in Section 4 in the recovery planning process, perhaps I would go to our Snake River salmon efforts to protect those species. The National Marine Fisheries Service has appointed a recovery team with a wide range of expertise, not just salmon experts. It does include biologists, but it also includes engineers and economists on this team, and they are developing one coordinated ecosystem based recovery plan for these species.

Consultation under Section 7 of the Act, as John has referred to, may be the heart of the Act. It certainly is a lot of our action. Two examples I could bring up have to do with sea turtles and with sea lions. In the case of sea turtles, the National Marine Fisheries Service looked at the effects of channel dredging in the South Atlantic that is under the authority of the Army Corps of Engineers, and we determined that that channel dredging could jeopardize endangered sea turtles in that area.

We worked with the Corps to stop dredging at times of the year when sea turtle density is high, and also the Corps agreed to implement a comprehensive research program to perhaps open that window based on what information they could gather on habitat use and requirements of sea turtles. The Corps is also committed to conduct research to develop dredging technology, if you will, that can be turtle safe.

The other example under Section 7 of how we would apply this in the marine environment is looking at the impacts of a pollack fishery in the Gulf of Alaska. We determined that the unrestricted fishing activity of this fishery could jeopardize listed stellar sea lions. However, through the fishery management regulations of the Magnuson Act, we were able to place restrictions on the amount and location of pollack harvesting, thus reducing the effects of groundfish trawling on sea lions because what we had here was a case of competition of resources between humans harvesting pollack in and around the rookeries of these sea lions.

Moving on to prohibitions under the Act, as John has said, the take, harm, and many other things of listed species is prohibited. However, the National Marine Fisheries Service has promulgated rules under the Endangered Species Act which will allow, if you will, a certain amount of take so that fishing activities can continue.

Perhaps the two most significant examples of this are the bottom trawl fisheries for shrimp and for summer flounder in the southeastern United States and the Mid-Atlantic respectively. Both of these fisheries, incidentally, take sea turtles, and the National Marine Fisheries Service has issued regulations under the Endangered Species Act to require turtle excluder devices in the nets of these fisheries. We feel that TEDS are an appropriate technology that allows fishing to continue while adequately protecting sea turtles.

The other examples that I might put out about how we have effected prohibiting take actually don't use the Endangered Species Act per se but use other Acts in our tools of protection, if you will. The Pelly Amendment to the Fishermen's Protective Act has been recently used to stop sea turtle trade by Japan. We certified Japan for trading in hawksbill sea turtles. They were the prime offenders of this species. We certified them, threatened sanctions, and through consultation and negotiation with the Japanese got them to end all sea turtle trade effective December of last year.

The other example is an Act that Congress gave us, what I refer to as the shrimp embargo legislation, Public Law 101-162, which, under the guidance of the State Department, some nations that are exporting shrimp to the United States are being required to use turtle excluder devices and also to effect conservation programs comparable to those that exist in the United States. That concludes my remarks. I will be pleased to answer any questions later.

Mr. STUDDS. Thank you very much, sir. Finally, Mr. Karl Gleaves, the General Counsel for Fisheries from NOAA. Mr. Gleaves.

#### STATEMENT OF KARL GLEAVES, GENERAL COUNSEL FOR FISHERIES, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Mr. GLEAVES. Thank you.

Mr. STUDDS. You will have to bring that embarrassingly closer.

Mr. GLEAVES. Thank you, Mr. Chairman. Ladies and gentlemen, I think as all of us are aware, the Endangered Species Act is one of our nation's most controversial environmental laws. Often this con-



troversy is couched in terms of species versus economics, sea turtles versus shrimpers, Pacific salmon versus significant economic consequences for utilities, irrigators, and other water users. My comments focus on the role of economics under the Endangered Species Act. This is a legal perspective. I will briefly analyze six different stages of the Endangered Species Act process and try to identify the relevance of economics at each of those stages.

First, with respect to the listing decision, I think the law is fairly clear in this case. If it is not, the 1982 amendments and the associated legislative history are explicit. Economic considerations have no relevance to determinations regarding the status of a species. I think the rationale is that this is a biological and a scientific decision, not an economic one.

Second, with respect to critical habitat designations, the law is somewhat different. This is a two-stage process. First, biological features in need of management are identified, but, next, critical habitat looks at economics. The statute states that the Secretary shall designate critical habitat after taking into consideration the economic impact and other relevant impact of specifying a particular area is critical habitat.

Now, unfortunately, the law is not clear on how these impacts are actually evaluated, and in some cases it can be quite troublesome. Trying to separate the economic impact of listing from the economic impact of critical habitat designation is sometimes very difficult or impossible. In many cases, the economic consequences that result from critical habitat designation, in and apart from the listing, may be minimal.

A third issue to be considered is the Section 7 mandate for Federal agencies to avoid actions that may jeopardize a listed species. Once a species is listed, the provisions of Section 7[a][2] apply, and Federal agencies are required to ensure that their actions are not likely to jeopardize the species.

I think the Supreme Court has resolved the economic question in this stage of the Endangered Species Act process. I think the indication is clear that this, again, is a biological or a scientific decision and should not involve the weighing of various economic consequences. In that case, the Supreme Court states, "Quite obviously it would be difficult for a Court to balance a sum certain, even \$100 million, against congressionally declared incalculable value even assuming we had the power to engage in such a weighing process which we emphatically do not."

But this jeopardy standard raises a fourth and associated question and that is the consideration of alternatives that would avoid jeopardy and a related issue, a Section 7[a][1] duty to conserve. As a practical matter, I think economic considerations are appropriate in evaluating these alternatives and in complying with the 7[a][1] mandate to conserve.

If a biological opinion would conclude that a Federal action is likely to jeopardize, the Secretary would suggest reasonable and prudent alternatives and regulations define these alternatives as those that are economically and technologically feasible. Likewise, under the 7[a][1] duty to conserve, recent Court cases seem to indicate that there is a large degree of latitude in complying with this

duty, and perhaps economics can be considered in complying with that.

A fifth stage is the Endangered Species Committee exemption process. In response to the Tellico Dam case, Congress established a very special process whereby seven high level Cabinet officials decide on granting an exemption and allowing a Federal action to go forward even in the situation where there could be a risk of jeopardy. One of the factors to be considered in making this decision or determination is a decision that the benefits of such action would clearly outweigh an alternative course of action that would preserve the species or its critical habitat. Clearly, economics plays a role in this decision.

Finally, a sixth and last stage of the ESA process is the recovery planning process and associated management actions. Perhaps here the economics question is most complex. I think in some respects economics clearly plays a role in this process, but, again, it is important to distinguish between biological decisions and economic ones. I think the legislative history indicates that developing recovery plan goals and the standards for delisting are biological decisions. In contrast, developing specific management actions that will allow us to reach those recovery goals, I think the implication is that economics may be relevant in certain cases. In this situation, I think economic factors may be most important.

If I could just quickly conclude, perhaps oversimplifying somewhat, I think the Act envisions that biological and scientific determinations, the establishment of biological goals, standards for determining whether a species is threatened, endangered, or recovered are just that—science or biology—and they don't involve economics. In contrast, in developing mechanisms to achieve these goals and evaluating alternatives and looking at alternatives to avoid jeopardy, economics is something that could be considered in relevant process. Thank you.

[The prepared statement of Mr. Gleaves can be found at the end of the hearing.]

MR. STUDDS. Thank you very much. Very useful and very helpful and incredibly prompt—on the money. Let me say that we anticipate a vote on the floor in roughly six or seven minutes. There are several members who have indicated that they have questions and, if necessary, wish to return so if it is necessary, given the time, we will do that.

Let me just ask a general question, if I may. I understand that the Administration has not yet developed its substantive position on reauthorization and potential possible amendments to the Act. Nonetheless, it is already clear by the thrust of the new Administration's approach that there is a new emphasis on a variety of directions, such as ecosystem protection and flexible implementation. Secretary Babbitt announced that he used the flexibility already inherent in the Act in wrestling with the problems of the gnatcatcher in California and the red-cockaded woodpecker in the Southeast.

Was there something unusual or unprecedented, or was it simply imaginative, in the way the new Secretary of the Interior approached those two particular problems under the Act?

Mr. SPEAR. Mr. Chairman, there was something unusual and to some extent unprecedented particularly in the gnatcatcher case, not that it was the first time the 4[d] rule had been used—the 4[d] rule which allows us to provide a special rule for a threatened species to limit the prohibitions on take. But it was the first time that we brought in in a very strong way the role of the State of California and recognized their significant efforts in terms of both their legislation and the process they had underway to solve this problem.

And the Secretary, in essence, recognized California's efforts and said in this 4[d] rule that once their process is in place, we will defer to the California process and the California effort to develop their own conservation plan because their effort is consistent with the Federal law, and with some oversight on the part of the Federal Government, we will allow them to carry forth the process of developing the habitat conservation plan for that species. The important new element there of the 4[d] rules was the strong recognition of the State.

In the case of the red cockaded woodpecker and the agreement with Georgia Pacific, what, I think, was so important there was the sheer magnitude of Georgia Pacific's sort of generous support for the red cockaded woodpecker in the sense that they agreed they—we worked hard with foresters, and Georgia Pacific stepped forward as they saw the take guidelines being developed and said in an innovative way that they would not only meet those guidelines, they would, in essence, meet the sort of guidelines that would be needed for recovery, and that they could manage their forests consistent with those guidelines and still make a profit.

Mr. STUDDS. And maybe it is sort of like the Act is more likely to work if those administering it wish it to work. You didn't say that, I did. The gentleman from New Jersey.

Mr. SAXTON. I would like to just pursue kind of a general issue with you as well. Let me say that I for one, and I am sure there are a lot of other people in this room, want very much to see this Act be as successful as it possibly can be. But, as the gentleman from Alaska pointed out, there seem to always be competing interests. I think you find that, as you deal with this continually, sometimes our efforts to correctly manage habitat and preserve endangered species are successful, and sometimes they are not. I would make the point that in those instances where they are not, that the competing interests simply win. In my State, for example, in the southern part of the State which has got a small population, we have an area known as the New Jersey pinelands. In that area is the Forsythe Reserve which has been set aside as an ecologically sensitive area in which endangered species can now recover. It is a successful habitat management program.

On the other hand, Congressman Pallone and I are currently witnessing another area where we suspect there are endangered species which may be endangered by a new issue—not a new issue but one that we are now dealing with. It has to do with dredging New York Harbor and dumping the contaminated dredge spoils six miles off the New Jersey coast. It appears that commercial interests are going to win that battle.



And so could each of you take a step back from your technical points of view and help us understand how we can better make our highly populated areas of people in the country understand the value of the Endangered Species Act so that we can win more battles that are important to endangered species? I guess I would just simply frame the question this way. How can we do a better job playing our role in perhaps modifying this Act and perhaps carrying out some kind of educational programs in the general sense within the population to make people understand why it is that this process is so vital to the existence of our planet?

Ms. MONTANIO. Yes. Certainly educational efforts are critical in all this. It is important to make the public and the industries and all involved parties aware of the role species play in the environment, and we would support any kind of efforts for education.

Mr. GLEAVES. Congressman, if I could follow up on that, with respect to the dredging activity specifically, I think one option that should be considered is the one you suggested earlier, a broadening of the critical habitat approach. The problem as I understand it, and I have to admit I am a lawyer, not a policy person, but after reading the biological opinion in that situation, it appeared to me that what we may be talking about is a situation where the habitat had already previously been destroyed, and at this point threatened and endangered species do not depend upon that habitat to any great extent.

Mr. SAXTON. If I can just interject here, I didn't mean to want to get into a discussion necessarily about that specific issue. I was kind of using it as an example of times when we don't do so well because economic interests and, therefore, public opinion turn against the objectives of this Act. And I guess my question in a more general sense is do we need to change the Act in some way so that it is better understood among members of the public who find themselves out of necessity opposing the objectives of the Act frequently and winning?

Mr. SPEAR. I would like to take a crack at that one, not to the point of saying what might be changed in the Act but getting to the point of economic interests sometimes appearing to be winning, I think some communities have recently learned that when one company seems to have won, all of a sudden they turn around and find out that a larger group of them have lost in the sense that to the extent the species habitat becomes smaller and smaller, the difficulties and the effort imposed on the rest of society in that local area becomes even larger in the context of trying to recover that species or possibly driving other species toward an endangered or threatened status.

So we found the situation in southern California with the gnatcatcher that the local communities began to see that as one housing development after another starting chewing up the coastal State scrub that pretty soon it was in the best interest of all of them to get together and develop a large plan known as the Habitat Conservation Plan or else those who were so-called last in line would never be able to do anything. So they decided to share the effort, so to speak, and take control at the local level so that they would all be part of the solution as opposed to just a few imposing a problem on the rest of them.

Mr. SAXTON. Thank you.

Mr. STUDDS. I thank the gentleman. The gentleman from California is next, but I think he might be a little more tranquil if we go vote now and then have plenty of time for questions when we come back. We will be in recess for approximately 10 minutes in order to allow members to vote, and then we will resume. Let me alert members that if they wish to ask questions they should return promptly, because we will not wait.

[Recess.]

Mr. STUDDS. If everyone will come to roost, we will continue. The gentleman from California was next.

Mr. HAMBURG. Thank you, Mr. Chairman. I would like to ask some questions about the extent of the Act's applicability on private lands, and in northern California in my district a certain timber company, Simpson Lumber Company, recently—I guess in the last couple of years, was able to prepare a habitat conservation plan to deal with the Northern Spotted Owl. I guess this would be directed to the folks from Fish and Wildlife. Could you describe the circumstances that trigger a requirement for a HCP in your view?

Mr. SPEAR. What triggers the requirement for a habitat conservation plan is the potential for take of an endangered species. When a private company sees that one of their efforts might take an endangered species or its habitat, in order to get a permit for that take—to allow the take, they must prepare a plan.

I don't know the details of the Simpson Timber, but I know that our director went out there, I guess, last year and made a presentation. They had prepared a habitat conservation plan for, I think, their entire ownership for protection of the spotted owl so it was a rather large effort, and, in essence, they showed how they would manage their timberlands so as to minimize take and, in essence, develop a conservation plan for the benefit of the species, allowing us to give them an incidental take permit which then allowed them to proceed with their business.

Mr. HAMBURG. That seems to have worked fairly well for this company. Are there other cases in which management plans are approved between private companies and Federal agencies and that is in cases where it is deemed that no take will result? Is that correct?

Mr. SPEAR. If no take will result, if we work with a private company and they are concerned with the take and they end up coming up with a plan where no take will result, then they don't need a habitat conservation plan. So in that effort it is a matter of consultation and coordination giving them technical assistance so that they can go about their operation without requiring a permit.

Mr. HAMBURG. And when we speak of take, we are speaking not just of taking of actual birds in this case, we are also talking about incidental take which could pertain not only to animals but also to habitat?

Mr. SPEAR. Yes. It pertains to the essential elements of the habitat.

Mr. HAMBURG. One of the concerns I have about these management plans, and I may have it wrong here, but is the degree to which the public is able to participate in the drafting of these management plans. And I am wondering if there should be any process

through which public input in the crafting of these plans is mandated?

Mr. SPEAR. This is, you know, a private company coming to us and saying, "We would like to manage our lands so as not to take." We would give them technical assistance, and if they came back and we worked out a plan with our advice and assistance, while it might be desirable for the public involvement, to the extent it is private land and there is not going to be any result in take, I can't necessarily see that that would really be necessary.

Mr. HAMBURG. I do think though it sometimes leads to situations where the public feels excluded because maybe they don't trust that the management plan will really take into account all the concerns and may not be satisfied that, in fact, takes are not resulting. This has been a very difficult issue. I don't know if you are familiar with the marbled murrelet and the case with Pacific Lumber Company, but this has been a real bone of contention in my district, the extent to which management plans preclude public input and may or may not judge correctly whether an incidental take may occur.

Ms. MONTANIO. I would like to add one thing to what was said in that there are two different ways of getting incidental take authority under the Endangered Species Act. One is through the incidental take permits, that were just talked about, with the habitat conservation plans given to private entities. The other is through Section 7 of the Endangered Species Act where we consult with the Federal agency and can authorize taking incidental to that Federal agency action. And, that Federal action can be funding of a private activity so we are essentially able to authorize incidental take to a private entity through Section 7 where there is a Federal Government agency funding or authorizing that activity. And that process does not contain a public review process in the Act as it is written now.

Mr. HAMBURG. Anyone else from Fish and Wildlife want to comment on this whole mess? Yes. I am just, you know, speaking for some of the folks in my district who are very concerned about whether—because of the confusion sometimes between State and Federal agencies where you have a species that maybe listed in one way on the State level, another way on the Federal level, and it seems like sometimes logging operations have continued even when there is significant concern that has been expressed by U.S. Fish and Wildlife because a State agency has given some level of approval.

And we had these competing jurisdictions, and we sometimes have activities that end up in long and costly and very contentious Court fights so there is some real confusion here, I think, in the public, and I hope that somehow in this process we can weed some of those confusions out and create a process that works better at least in my congressional district.

Mr. SPEAR. Congressman, I would like to add, you characterize the situation as one that a company comes to us and says they don't want to take, and to us, you know, that is a delightful prospect. And we can work out a plan that they don't take, and they are allowing us to provide assistance and judgment. They don't have to come to us so when somebody voluntarily does that, we are,



of course, pleased, and to the extent they abide by recommendations that we might make, then, you know, we will eventually be a Judge.

If they end up do taking, then, of course, there are legal sanctions. If you are talking about a different case where a company hasn't done that and there is a real question about whether they have taken, then, of course, that is a law enforcement matter. And we have to judge that on the circumstances of whether they have abided by their own plan.

Mr. HAMBURG. But companies do look prospectively, and if they know there is, you know, a group out there that is ready to sue them, they will consult with Fish and Wildlife. And there are cases in which they get opinions back from Fish and Wildlife that, yes, we do think there is going to be a take here. And then they go ahead anyway with what they were going to do because they have an approval from a State agency saying that, you know, to go ahead.

And then the Federal agency has to decide whether or not they want to pursue that in a legal manner, and more often than not, they don't. At least in the cases that I am familiar with, they choose not to because trying to prove after the fact whether there has been an incidental take is a very difficult thing indeed to prove. And so we have companies that just—they roll the dice. They figure there is more value from cutting down those ancient redwood trees than the cost to defend it in Court.

Mr. SPEAR. It is not only difficult to prove after the fact, it is sometimes difficult to get U.S. attorneys interested in these kinds of difficult cases where there are going to be some real contentious issues in Court and not clear solutions, not a clear verdict.

Mr. HAMBURG. So we had a case—I know my time is up but—where U.S. Fish and Wildlife determined that they would not take legal action against a certain company for action that had already occurred if that company would agree to do a HCP. I am not criticizing you but just pointing out that the difficulty in winning these cases in Court results in trying to bargain something for the future instead. But I don't know. This is a very, very difficult issue for us. So if we can get any clarity on it, that would definitely help me.

Mr. STUDDS. The gentlewoman from Oregon.

Ms. FURSE. Thank you, Mr. Chairman. I have a couple of questions. I have been looking into finding out if there are any studies on the effect of factory trawlers on the bottom, particularly habitat, and I can't find any extensive scientific studies. And I am wondering whether NMFS probably most importantly could comment on why there aren't, and if there aren't, how can you decide that factory trawlers are not having an effect on endangered species?

Ms. MONTANIO. I am not sure I understand your question. Are you talking about effects on the bottom itself?

Ms. FURSE. Yes.

Ms. MONTANIO. The environment versus the species?

Ms. FURSE. Well, there must be species within the environment so I am wondering if there is any kind of study on, for instance, bottom fish that shows that factory trawlers as having or not having an effect on endangered species.

Ms. MONTANIO. I am not aware of particular studies but can check and provide any to you if there are some.

Ms. FURSE. Well, I am not aware of any either so I am concerned that without such information we really don't quite know what is happening to that environment and, therefore, what might the effect be on endangered species.

Ms. MONTANIO. But in many cases, we do not know what the impacts of particular fisheries, et cetera, are on endangered species, but where we have information to lead us to believe that there is a problem, we attempt to do the studies or to establish observer programs to get the information to find out what the problem is.

Ms. FURSE. Another question. Under Section 7 of the Act, the coordination and consultation, I have had people from my district be very concerned that the Forest Service will approve a timber sale with the not-likely-to-jeopardize ruling. But I am wondering where does NMFS have its consultation about what might be the effect on, say, a fishery further down in the ecosystem? Can you stop another Federal agency's not-likely-to-jeopardize ruling?

Ms. MONTANIO. Under Section 7, each Federal action is looked at individually or as a group of actions. And for the salmon consultations, we have attempted to group harvest activities, group habitat by watershed basis activities, and come up with the jeopardy versus no jeopardy finding. But the primary analysis in Section 7 is what the impacts of that particular activity are on the listed species of concern.

Ms. FURSE. And I am hearing from my district that there is a concern that agency opinions are not as coordinated as they might perhaps be, and maybe that is something you might look at and see if you could do some increased activity together on each other's concern. Thank you, Mr. Chairman.

Mr. STUDDS. The gentleman from Maryland.

Mr. GILCHREST. Thank you, Mr. Chairman. I just have a very general series of questions. I do beg the indulgence of the people giving testimony because I have a meeting at 11:30 so I guess just right to the point. The first one is could someone tell us the chief cause for species decline and habitat degradation on the planet?

Mr. FAY. I thought we had an easy question until you completed the second half of that, Mr. Gilchrest, because I was thinking, oh, the chief cause of species decline—well, that is habitat degradation. But I don't think there is any one chief cause of habitat degradation unless you define it so broadly as to make it almost meaningless and to talk in some kind of vague terms about human effects on habitat.

Mr. GILCHREST. Could we say then the chief cause of species decline and just leave it at that?—which is then habitat degradation—

Mr. FAY. I don't think there is much question in my mind or anybody who deals with these issues that the decline in the quality and quantity of habitat is the principal determinant of the decline of species and that most of this decline in habitat is mediated by human activity.

Mr. GILCHREST. OK. The second question is, is there a point at which we as humans—I guess I could put it this way. What is the population capacity of the earth in order to require the quality of

life to be sustained at least as we know it in the United States? And if the chief cause of habitat degradation is population expansion, is there a point at which there is a saturation that we will meet that saving species will become almost impossible?

Mr. FAY. I think you are ready for the post-graduate course, Mr. Gilchrest. We can graduate you from 101 today. That is a very interesting observation, and I think the point is very difficult to extrapolate. The trends are not very difficult to extrapolate, and so I think it is clear that there is some point at which human population overwhelms the carrying capacity of the planet. I don't think anybody is very confident in predicting what that point is, but I don't think anybody is particularly unsure of the trend. I would invite anybody else at the table here to jump in on this and add to what I have said.

Mr. GILCHREST. What would happen if every species listed now as endangered or threatened would become extinct in the next 10 years? What would happen to the quality of life on the planet? I mean, you could even use an example to a particular region or ecosystem like the Chesapeake Bay or the Northwest or the Gulf of Mexico—taking into consideration—just to frame the question—as soon as one species is eliminated or the spotted owl becomes extinct, what happened to everything that kept the spotted owl alive? Is that also extinct or degraded or whatever?

Mr. SPEAR. I don't know that we can take it down to those other species, but I guess I have to start with an observation of coming from the Southwest. Life would have been a lot less fun in the Southwest if we couldn't anticipate the whooping crane every spring and then getting ready for it and watching it fly and tracking it on down from Wood Buffalo National Park down to Texas. I think the people up in the northern Rockies—you know, even many of those who haven't seen the grizzly bear knowing they are there and the anticipation maybe of bringing back wolves and some of the other species. So there is one level that you could comment on that maybe is a little easier than trying to anticipate what might be all the other interconnections. That is not a biological argument, but it is certainly an argument that many would make—certainly I would make.

Mr. GILCHREST. And I have the yellow light now, but some of you had made a comment, and I think it was Mr. Gleaves, that when you make recovery plans or when you make distinctions, there is a clear distinction between biology and science and economics. When we begin to develop, let us say, recovery plans or holding onto open space and habitat, when we manage the biology and the economy, isn't there a consideration about population growth management that has to be taken into consideration?

And would it be, and it is probably being done, useful for some type of satellite imaging to show an ecosystem to a region such as a county or a State that says where the development is now, where you might expect it to be in 10, 15, 20 years, and what is the usefulness of holding onto that open space or that ecosystem or that watershed?

Mr. GLEAVES. Again, I think that is a very good question. The goals of a recovery plan are supposed to include standards for de-

listing. I guess I view that as a biological or scientific question. How you achieve those goals is a far more difficult issue and—

Mr. GILCHREST. If I could just draw—in the estuary of the Chesapeake Bay, for the most part our economy is heavily dependent on recreational activities and harvesting what comes out of the Bay. The more people we have, the more degradation you have to the Chesapeake Bay. The less recreational activities you have—basically, the Canada geese population has dropped from about 600,000 to 200,000 in about 10 years. So I guess to me that is an economic issue also so I don't see the distinction, for the most part, between biological science and a productive economy. And, you know, there are so many other things blended in with that.

Mr. GLEAVES. Well, I think there are obviously economic values to preserving species, to preserving ecosystems, to preserving habitat. There are recreational values, aesthetic values, a variety of other considerations. I think to look only at the downside cost of species protection is not a good way to look at it. But how you protect the economic costs and benefits makes habitat management one of the most troublesome issues.

Mr. GILCHREST. Thank you. I know those are all biology or philosophical questions 101, but I just wanted to get them out. Thank you.

Mr. STUDDS. I don't want to interrupt one of the genuine conservatives on the minority side. I appreciate the gentleman's questions. They are wonderful. They are unprecedented. They are thoughtful. And you all can give written responses if you would like. I think you forgot to ask about the color of the sky and the grass and things like that but—

Mr. GILCHREST. I do have one question though since you brought that up. This was asked by, I think, a 10 or 11 year old to me. Can light get wet?

Mr. STUDDS. The gentleman's time has expired. The gentleman from New Jersey.

Mr. PALLONE. Thank you, Mr. Chairman. I wanted to ask the question, I guess, of the National Marine Fisheries Service representatives. I understand that what basically—and I guess in the memorandum that came to us today in Section 7 of the Act, it requires all Federal agencies to support the conservation of threatened and endangered species.

I guess going back to what Congressman Saxton mentioned before, and I am, again, bringing this up in the context of the bill as a whole but specifically with this dioxin-dredging permit that was issued earlier this week off the coast of New Jersey—off the coast of my district, we were involved from the beginning in trying to get the National Marine Fisheries Service to essentially consult, I guess, and look at the whole matter. And there was serious concern about the effects on endangered or threatened species where the dioxin material is to be dumped.

And I guess it was on—I actually have the letter—May 18—the permit was issued yesterday which, I guess, was the 26th, and we received a letter, I think, just at the end of last week which was dated May 18 from Nancy Foster who is the Acting Assistant Administrator for Fisheries. Basically, this letter was sent to the



Corps of Engineers telling the Corps, and, you know, I could enter it into the record without objection, Mr. Chairman? OK.

[The letter from Nancy Foster can be found at the end of the hearing.]

Mr. PALLONE. And essentially what she says in the letter is that she is very concerned about the effects of the ocean disposal of dioxin-laced dredge materials and basically concludes the letter by saying that if the Corps cannot assure that there will not be substantial impacts on the marine resources, then the permit should be denied or the decision deferred until such information is developed.

Now, this obviously arrived there, you know, within a day or so before the permit was issued. The permit was actually issued yesterday. And when the letter was received, you know, I wrote to the Army Corps, as did many of the environmentalists in New Jersey, saying that if there is an effect—if they feel that there is an effect on endangered species, you know, what is the NMFS essentially going to do about it? The problem that I have is that I really don't understand what NMFS's role is.

In other words, if they are sending information to another agency which is going to take action that would affect endangered or threatened species, don't they have any teeth? In other words, it doesn't seem like it matters what NMFS does. The Corps went ahead and issued the permit. I don't have any indication that they paid any attention at all to this letter. It is hard to imagine that they could have in any case because it arrived a day or two before they granted the permit. So what role does NMFS play in a situation like that? How do they actually force another agency not to take action that would affect endangered species?

Ms. MONTANIO. OK. There are two roles that NMFS plays. One is in the biological opinion process and formal consultation, and we determined that the proposed action was not likely to jeopardize listed species. Just because we made that determination of no jeopardy does not mean we are not concerned about potential impacts. I mean, there are potential impacts. We did not believe the impacts rose to the level of jeopardizing the species which is the restrictive provision of Section 7[a][2] of the Act.

I am not familiar with the letter, but we do have a role in marine habitat in general and effects to listed species from any activity that impacts it adversely, whether or not it is jeopardy, and would like to see measures taken to reduce those impacts.

Mr. PALLONE. So in other words, a decision was made at an earlier time that there was no serious jeopardy or whatever the term of art is on the endangered species, but subsequent to that time, this letter was sent to basically say, "Well, you may not be totally killing them off," whatever, if I could use layman's terms, "but we still see a problem here"?

Ms. MONTANIO. Right. And I think that letter you are referring to was a general letter on dumping in general, not specifically on that permit.

Mr. PALLONE. In other words, there is no obligation under the law for the Corps in this case to actually respond to this letter before they go ahead and take any action?

Ms. MONTANIO. I don't believe so. I think that was strictly a recommendation.

Mr. PALLONE. And they don't even have an obligation to respond to it before they issued the permit?

Ms. MONTANIO. Not under the Endangered Species Act.

Mr. GLEAVES. If I could just follow up, even with a jeopardy determination, the ultimate responsibility for going forward with that action or deciding not to rests not with the service agency, NMFS or Fish and Wildlife Service, but with the action agency. In this case, it was the Corps of Engineers.

Mr. PALLONE. So in other words, even if you determine that there really was an actual threat to the species, that other agency in this case, the Corps, can essentially do what they want. You don't have the power to stop them from issuing a permit?

Mr. GLEAVES. Well, we do issue our opinion, but it is an opinion. It obviously carries weight in case an environmental group might challenge the action, but fundamentally the action is taken by the Corps of Engineers or the action agency. And we are consulting with them. We issue a biological opinion. But we are not responsible for deciding to——

Mr. PALLONE. Well, one of the things they are talking about doing, and I have indicated that I would support them, is to bring suit. But actually the only enforcement action then is a suit by one of the environmental groups. All right. Thank you. I don't like it, and I am sure you don't either, but I am glad to know what the law is.

Mr. STUDDS. Or just quite possibly the realization that ultimately both agencies have the same boss, which reminds me, the gentleman from California.

Ms. ESHOO. Thank you, Mr. Chairman. And I think that this conversation is going to have to continue. I have had, to the gentleman from New Jersey, extensive experience with the Corps and dredging and this whole issue, and I think it is something that we need to come back to.

I apologize for coming and going from this hearing. This is a large day in the life of the Nation as we are doing planning for the future, not only in terms of endangered species but for, in my view, the well-being of the nation. So if this question has been asked previously, just bear with me. Earlier in this session, we had Secretary Babbitt come and testify before us, and he spoke about wanting to prevent train wrecks. And I think that much of the discussion here today and subsequent discussion is going to be around that where we call for a broader ecosystem approach to endangered species in our reauthorization of the Act.

What are the two agencies, both FWS and NMFS, doing to accomplish this goal, and are there actually provisions in the Act now that allow the agencies to take this approach? And maybe someone can tell me exactly what rule 4[d] is about? Does that allow for it in the California experience? In the HCP experience?

Mr. SPEAR. There are really two different questions you brought up, and the preventing train wrecks issue, which is not specifically the 4[d] rule, and I will try to cover both——

Ms. ESHOO. Well, if you could—excuse me—what was invoked that allowed—maybe was it good will or was there something in the Act that allowed for that to take place?

Mr. SPEAR. The 4[d] rule?

Ms. ESHOO. Yes. And is it 4[d]? I don't know.

Mr. SPEAR. Yes. It is Section 4[d] of the Endangered Species Act which allows us for threatened species to modify the prohibitions on take in the rule. In the actual listing of the species, we can put forth a separate rule that says here is how we are going to deal with the questions of take that might result from having listed the species. In that case—and it did come up earlier, but I will quickly review—what we did was support the effort of the State of California in our Natural Communities Conservation Program and said as that program proceeds, we will recognize the efforts of that program in the State of California and define the take and regulate the take as opposed to the Federal Government and as long as they follow the basic guidelines that they had started.

Ms. ESHOO. How many other States have a plan that can be—I mean, what you just described was a fortunate set of bookends that allowed this to happen. Do other States have plans?

Mr. SPEAR. I don't have a complete review of that, but my guess is very few States would have the circumstances which would have allowed us to put forth the 4[d] as we did in the California case. California had a very specific set of rules first in the Endangered Species Act and then a separate Act for the Natural Communities Conservation Program that even referenced back to the Federal Endangered Species Act so it was a very complete set of State actions.

Ms. ESHOO. Does someone want to speak to the habitat conservation plan and if that is one of the models that we should be looking at as we look to expand this and avoid train wrecks and do comprehensive planning? I have had experience with one. I believe it was the first one, San Bruno Mountain in northern California.

Mr. SPEAR. That was the first.

Ms. ESHOO. Yes.

Ms. SPEAR. The gnatcatcher example—the southern California example—we think the Department is perhaps the potential model for the future. Not only does it use a State process and recognize it and allow us to work together more cooperatively and the decisions to be made more locally, but it is also very farsighted, very sophisticated. It involves looking at many other species other than listed species as well. It is a multispecies plan incorporating in some areas as many as 90 other species that are potentially listable in the future and some high visibility species. If it is done well, there is the probability that some of those species that otherwise might have been listed once this plan is completed will now be protected and will also prevent future listings. So there is a real model in development in the Orange, Riverside, and San Diego Counties.

Ms. ESHOO. Anyone else? Mr. Chairman, thank you very much. On the issue of the Army Corps of Engineers and what is taken and other agencies issuing opinions that—I leaned over and I said to my colleagues here, “I don't think Harry Truman would have accepted the answer,” because it was kind of on the one hand but

then on the other hand, and yet there is not the force of something unless community groups take the action.

We need to repair something there because, most frankly, the opinions that are issued are dependent upon conscientious people inside of an agency, and then it becomes a tool for citizens, but there isn't any force anywhere. The tools are not—we are not able to use them to see through the continuum of protection, and I think that that is a major gap. And I would really like to come back to that one. I think it is a very important one.

I mean, I have dealt with the Army Corps of Engineers, and regardless of what anyone else said, their business was dredging. And talk about an economic interest, I mean, they saw it as their being put out of business, and that was it, and they had their way. So it is something that we need to come back to, and I think it is an important one, not just in California but all over the country. Thank you.

Mr. WILLIAMS. If I could briefly follow up on that, I don't think there is a case of a Federal agency that has ignored a biological opinion that is on jeopardy in the activities. I referred to one earlier in my testimony about the Corps of Engineers specifically in the South Atlantic where we did find jeopardy, that their dredging activities were jeopardy, and there was a lot of howling and screaming from the Corps and its contractors about that opinion, but we worked out a solution with them. So I think it is getting to jeopardy may be a question, and certainly at that point agencies may not respond as quickly or maybe the way we want, but I have no experience of anybody ignoring a jeopardy opinion.

Ms. ESHOO. What was the opinion that we were talking about earlier though? This is not jeopardy?

Mr. WILLIAMS. That is correct. It was not jeopardy.

Ms. ESHOO. Well, how is jeopardy defined? Extinction or what is it? What is jeopardy besides a very good TV show?

Mr. FAY. Basically, it is the standard for Section 7 compliance, that is the prohibitive standard that an agency may not take action that would contribute to jeopardy of a species. And it is defined in regulation as significantly—oh, I am going to paraphrase—but it is along the lines of significantly impairing both the survival and recovery of the species. And that has been somewhat controversial I might as well point out because it does conjoin survival and recovery rather than treating them separately. And so it is possible that an action may affect and in fairly serious ways the eventual recovery prospects of a species but still not trip the jeopardy trigger that would be required to get a jeopardy opinion and consultation.

Mr. STUDDS. The gentleman from New Jersey.

Mr. PALLONE. I just wanted to comment on what the gentlelady from California said. It is true that in my particular circumstance I was talking about they didn't issue a jeopardy opinion. I didn't know that until today. But the problem was that subsequent to that and basically within a day or two before the Corps issued its permit, a letter—in a sense a recommendation letter which we put into the record was issued saying please look into the possible implications, and if there are alternatives to disposal option in the ocean, we would like you to look at those seriously and think about the alternatives.



My problem is that since it is only recommendatory, I have no reason to believe it was paid much attention to, if any, because of the time it arrived. And I think that is the overall problem, and what you are getting at, whether it is a jeopardy opinion or not, is that essentially what they are saying is there is consultation, which there was in my case, and the Corps obviously sat down and talked to the NMFS about the potential problems, but the weighing of those things and the ultimate decision was with the Corps.

And I have no reason to believe that, you know—they would probably disagree with me—that the Corps was giving enough weight to the environmental concerns. And I think that is the problem here. What weight are they given in the whole process? And I don't know how you resolve that, but I think that we definitely need to look into this issue. Thank you, Mr. Chairman.

Mr. STUDDS. Thank you. Well, if 101 has led us to the conclusion that all is not perfect, perhaps it has been successful. But 201, I assume, will begin with the problem of the wetness of light and proceed from there. Thank you all. We obviously have our work cut out for us, and as I said, this is the first and most elementary and, in a sense, the easiest of the series of hearings that has now begun. We thank you very much. The Subcommittee is adjourned.

[Whereupon, at 12:04 p.m., the Subcommittee was adjourned, and the following was added to the record:

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**U.S. House of Representatives**  
**Committee on**  
**Merchant Marine and Fisheries**  
 Room 1334, Longworth House Office Building  
 Washington, DC 20515-6230

May 19, 1993

## BACKGROUND MEMORANDUM

TO: Members, Subcommittee on Environment and Natural Resources

FROM: Subcommittee Staff

SUBJECT: The Endangered Species Act

On Thursday, May 27, 1993, the Subcommittee on Environment and Natural Resources will hold a hearing on the Endangered Species Act (ESA). The hearing will begin at 9:30 a.m. in Room 1334 Longworth House Office Building. Representatives of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) will provide the Subcommittee Members with an overview of the ESA and discuss controversies associated with the Act. At this time, the Administration does not have a position on the legislation which has been introduced and, therefore, witnesses will not address major policy questions.

BACKGROUND\*\*

The Federal Government has addressed the conservation of endangered species since the Endangered Species Preservation Act was passed in 1966. In 1969 the Act was amended and renamed the Endangered Species Conservation Act. In its present form, the Endangered Species Act of 1973 (P.L. 93-295, as amended; 16 U.S.C. 1531-1543) is one of the Nation's strongest environmental laws. Passed in response to a concern that various species of fish, wildlife, and plants had become or were in danger of becoming extinct as a consequence of economic growth and development, the Act embodies a fairly comprehensive approach to maintaining species diversity in the United States and elsewhere.

Under the Act, the Secretaries of the Interior and Commerce, with operational authority delegated to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, are assigned to carry out the provisions of the law. The Department of Agriculture's Animal and Plant Health Inspection Service is responsible for issues relating to the import and export of endangered plants.

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THE ACT

Under the ESA, protection is provided to species listed as endangered or threatened. Any species or subspecies of fish, wildlife, or plants may be listed, as well as geographically distinct populations of vertebrate species. The responsible federal official is directed, to the maximum extent prudent and determinable, to identify and designate areas of habitat that are critical for each species at the time of listing.

There is a legal distinction between threatened and endangered species with respect to the Act's prohibitions. This difference provides a measure of administrative flexibility. The Act's general prohibitions are applied by statute for endangered species and substantially the same prohibitions are applied by regulation for threatened species. Special regulations can be issued for threatened species when it is judged that the full range of protection is not needed.

A summary of the key sections of the Act follows.

## SECTION 2

The purpose of the Act is stated very clearly as the maintenance of endangered and threatened species and the ecosystems upon which they depend. All agencies of the Federal Government are expected to conserve endangered and threatened species and are to use their existing authorities to further the purposes of the Act.

## SECTION 3

Terms which are important to understanding the Act are defined in this section. The following is a list of some of the key terms:

"Species" means any species or subspecies of plant or animal and, in the case of vertebrate life-forms, includes any distinct population segment as well.

"Endangered species" means a species in danger of extinction throughout all or a significant portion of its range.

"Threatened species" means a species likely to become endangered in the foreseeable future throughout all or a significant portion of its range.

"Critical habitat" means the specific areas within the geographical area occupied by a species at the time of listing, within which are found those physical or biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protection, as well as areas outside the range of the species which are essential to its conservation.



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"Conservation" means the use of all methods and procedures necessary to bring a species to the point at which the protective measures of the Act are no longer necessary. Conservation is therefore synonymous with "recovery".

"Taking" refers to not only hunting, shooting, wounding, killing, trapping, capturing, and collecting, but also "harming and harassing." "Harm" is defined in the regulations as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering."

#### SECTION 4

Section 4 encompasses the listing of species, designation of critical habitat, and development of recovery plans. In order to provide for the conservation of species, a process of determining those species in need of attention is paramount. The responsibilities and authorities of the Fish and Wildlife Service and the National Marine Fisheries Service are broadly framed as the determination of whether "...any species is an endangered species or a threatened species..." The Act provides the opportunity for the public to petition the respective agency for a species to be listed, and it makes the agencies accountable to petitioners.

Listing statistics, as of March 1993, are:

|                 |      |
|-----------------|------|
| SPECIES ON LIST | 1294 |
| U.S. Species    | 762  |
| Endangered      | 585  |
| Threatened      | 177  |
| Foreign Species | 532  |
| Endangered      | 493  |
| Threatened      | 39   |

The ESA authorizes special rules to adjust the general protective measures available for threatened species and experimental populations. Section 4(d) of the Act allows the FWS and the NMFS to issue regulations considered necessary to provide for the conservation of the species at the time of listing.

When one of the administering agencies determines a species to be threatened or endangered, section 4 requires that it specify, "to the maximum extent prudent and determinable", the species' critical habitat. If critical habitat is not considered determinable at the time a final rule is adopted to list a species, the agency must designate critical habitat "to the

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maximum extent prudent" within one additional year. Designation of critical habitat thus implies not only rather specific knowledge of the habitat needs of a species, but also an idea of what would be needed in the way of habitat protection and management to bring about the species' recovery.

A 1978 amendment that required designation of critical habitat to the maximum extent prudent also required an examination of the economic and other relevant impacts of the designation above and beyond the impacts of listing. In addition, it also allowed areas to be excluded from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, unless exclusion would lead to the extinction of the species.

Once a species has been listed, a recovery plan must be prepared for that species. A recovery plan establishes recovery goals and objectives, as well as an implementation schedule and a cost estimate. A plan is expected to define a recovery goal that would allow the species to be removed from the list and to set forth the means of achieving that goal. Prior to being adopted or revised, plans are subject to public review.

#### SECTIONS 5 AND 6

Section 5 provides authority to acquire land for the benefit of endangered and threatened species. Section 6 establishes a Federal cost-sharing grant program for State governments undertaking endangered species conservation.

#### SECTION 7

Section 7 requires all Federal agencies to support the conservation of threatened and endangered species.

Section 7(a) directs agencies to carry out programs for the conservation of endangered and threatened species and requires them to ensure that the actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. Because of the wide range of Federal authorities and the vast amount of land administered by Federal agencies, these provisions have been important in promoting conservation. To ensure compliance with these standards, agencies must consult with the Fish and Wildlife Service or National Marine Fisheries Service on actions that may affect listed species or critical habitat. The Fish and Wildlife Service and the National Marine Fisheries Service issue "biological opinions" about the impact that the proposed action is likely to have.

After consulting with the appropriate Secretary, Federal agencies must ensure that their actions (including those regulating private actions) are "not likely to jeopardize the continued existence" of any endangered or threatened species nor adversely modify critical habitat. "Action" is quite broadly defined to include anything authorized, funded, or carried out by the

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agency, including permits and licenses. If the Secretary finds the action would jeopardize the species, he or she issues a "jeopardy opinion" and must suggest reasonable and prudent alternatives that would avoid harm to the species. Agencies may not make irretrievable commitments of resources that would foreclose any of these alternatives.

The biological opinion must address any taking of a species that might occur incidental to the action and prescribe means to minimize it. Through the analysis of the effects of the action on listed species and critical habitat, the FWS or the NMFS may recognize that some individuals or a certain amount of habitat may be taken, in which case an incidental take statement will be provided with the biological opinion. The statement will describe anticipated take, reasonable and prudent measures to minimize the take, terms and conditions to implement the reasonable and prudent measures, and the procedures to be used to handle or dispose of any individuals of the species actually taken.

#### Statistics on consultation:

- Of the 18,000+ consultations conducted by the FWS and the NMFS from 1987-91:
- 16,161 were informal;
- 2,050 were formal;
- 181 resulted in jeopardy opinions; and
- Of those 181, 23 had no "reasonable and prudent alternatives". The other projects could proceed, if modified.

Section 7 contains an elaborate but little-used process that allows a Cabinet-level committee to exempt an agency's action from the duty to avoid jeopardy to a species or adverse modification of critical habitat. The Act invests this group with the authority to allow a listed species to be jeopardized or possibly become extinct and is a measure of the seriousness it accords these matters. Because this Committee is authorized to determine the future existence of a species, it is sometimes referred to as the "God Committee" or the "God Squad".

### SECTION 8

Section 8 establishes a program of international cooperation for the protection of endangered species and implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This Convention, which has 96 member nations, governs trade in species determined by the parties to be in danger of extinction.

### SECTION 9

Section 9 prohibits the "taking" of endangered animals (see definition of take). A distinction is made in terms of plants in that the taking of endangered plant species is not prohibited.

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Beginning in 1979, a set of lesser prohibitions have been applied to plants. The Act currently prohibits the removal, malicious damage, or destruction of endangered plants in areas under Federal jurisdiction and elsewhere prohibits collection, damage, or destruction only when it also violates State law or occurs in the course of a violation of State criminal trespass law.

Section 9 also includes trade provisions which apply comparably to plants and animals, and prohibits import, export, and interstate trade in endangered species or products derived from them.

#### SECTION 10

Section 10 provides that a permit can be issued allowing the take, import, or export of a listed species under certain circumstances, including those necessary to carry out scientific research. In addition, this section allows a taking to occur incidental to otherwise lawful activities conducted in accord with an approved Habitat Conservation Plan (HCP). HCPs closely correlate with the idea of ecosystem management, as they have increasingly included several species, including candidates, within a plan.

#### SECTIONS 11 AND 12

Section 11 of the Act establishes penalties and enforcement provisions of the Act. Civil penalties under the Act can be as much as \$25,000 and criminal penalties can go as high as \$50,000 per violation. Section 12 pertains to the protection of plant species at risk of extinction.

#### SECTION 15

Section 15 establishes authorization levels for appropriations to carry out the Act.

#### APPROPRIATIONS TO THE FISH AND WILDLIFE SERVICE FOR ENDANGERED SPECIES, FY1991-FY1993 (appropriation \$ in thousands)

| <u>ACTIVITY</u>         | <u>FY1991</u><br><u>enacted</u> | <u>FY1992</u><br><u>enacted</u> | <u>FY1993</u><br><u>enacted</u> |
|-------------------------|---------------------------------|---------------------------------|---------------------------------|
| Pre-listing (a)         | --                              | --                              | 2,135                           |
| Listing                 | 4,272                           | 7,378                           | 6,250                           |
| Consultation            | 5,204                           | 8,130                           | 9,567                           |
| Permits                 | 889                             | 1,199                           | 1,358                           |
| Recovery                | 12,491                          | 19,045                          | 20,388                          |
| Coop. End. Sp. Fund (b) | 6,671                           | 6,621                           | 6,565                           |
| Spotted Owls (c)        | 1,050                           | --                              | --                              |
| Law Enforcement         | 8,811                           | 10,341                          | 10,507                          |
| Research                | 7,577                           | 7,844                           | 7,676                           |
| <b>TOTAL</b>            | <b>\$46,965</b>                 | <b>\$60,558</b>                 | <b>\$64,446</b>                 |



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a/ This category of funding was included under Listing before FY1993.  
 b/ This program was formerly called Grants to States. The new fund is similar in nearly all respects except that the authorization ceiling is set by formula.  
 c/ In FY1992 and FY1993, funds for spotted owls are included in the "recovery" category.

**APPROPRIATIONS TO THE NATIONAL MARINE FISHERIES SERVICE FOR ENDANGERED SPECIES, FY1992-FY1993 (appropriation \$ in thousands)**

| <u>ACTIVITY</u>                        | <u>FY1992</u>  | <u>FY1993</u>  |
|--|----------------|----------------|
| Resources Information                  | \$6,298        | \$6,821        |
| Information Analysis and Dissemination | 191            | 194            |
| Fisheries Management                   | 299            | 288            |
| Protected Species Management           | 1,392          | 1,298          |
| Enforcement and Surveillance           | 274            | 220            |
| <b>TOTAL</b>                           | <b>\$8,454</b> | <b>\$8,821</b> |

**THE CURRENT SITUATION**

The authorization for the Endangered Species Act expired on September 30, 1992. Since then funds have been appropriated to allow the provisions of the Act to be carried out and all prohibitions, rules, etc. to remain in effect.

As in the past, much of the debate over endangered species focuses on particular species; current controversies involve the spotted owl, the fountain darter in Texas, the Chinook salmon, the delta smelt, the California gnatcatcher, the red cockaded woodpecker, and the marbled murrelet.

**NORTHERN SPOTTED OWL**

The Northern spotted owl has been at the center of an extremely controversial situation in the Pacific Northwest. The spotted owl was listed as threatened July 23, 1990, the debate over its protection has pitted the timber industry against environmentalists. The owl is dependent upon old growth forests for its habitat and these forests contain very valuable timber. In an attempt to protect the owl and the economy in the Pacific Northwest, the President held a forest summit in Portland on April 2, 1993, to start the work of crafting a solution to the situation. Preliminary proposals are expected early in June.

CALIFORNIA GNATCATCHER

The California gnatcatcher is a small songbird native to coastal sage scrub in southern California and is threatened with extinction due to habitat fragmentation and loss as a result of development. On March 25, 1993, the USFWS listed the species as threatened. At the time of listing, Interior Secretary Babbitt promulgated a 4(d) rule, in an effort to allow orderly development to occur while habitat protection, enhancement, or restoration are provided for the gnatcatcher. The 4(d) rule recognizes the regional conservation efforts that had already been undertaken by the state in southern California prior to the listing.

RED COCKADED WOODPECKER

The red cockaded woodpecker was one of the first species listed under the ESA in 1973. Habitat for the woodpecker consists of forests in the Southeastern United States which have been eroded by logging and urban development. On April 15, 1993, the FWS and the Georgia Pacific Corporation entered into an agreement that will restrict operations on 50,000 acres of the woodpeckers' habitat and in return, Georgia Pacific will be able to continue operating on 4.2 million acres of Southern timberland without the risk of violating the "take" prohibitions of the ESA. In addition, Georgia Pacific will be required to protect any newly discovered woodpecker colonies on any of its lands.

DELTA SMELT

The delta smelt was one of the most common and abundant fish caught by the California Department of Fish and Game in trawl surveys during the early 1970s. In the past 20 years the species has declined by 90 percent as a result of 1) reduced water outflows from the Sacramento and San Joaquin Rivers due to drought and water diversions; 2) water pollution; and 3) the introduction of exotic species. On March 4, 1993, the USFWS listed the species as threatened. The listing of the delta smelt could have implications for the operation of the Central Valley Project and the State Water Project and the availability of water for irrigation.

FOUNTAIN DARTER

In San Antonio, Texas, the withdrawal of water from the Edwards Aquifer to service 1.5 million people, has run into a conflict with protection of the fountain darter, an endangered species listed in 1970. A federal district judge in San Antonio recently directed the Texas Water Commission and the state legislature to devise a plan to protect minimum springflows from the Edwards Aquifer for conservation of the species. The aquifer is also the city's sole source for drinking water. Currently there are no restrictions on the amount of water that can be taken from the aquifer. The plan for the aquifer is now pending before the Texas legislature.

PACIFIC SALMON

In 1991-2, the NMFS listed three wild salmon populations in the Columbia River Basin as threatened or endangered. Affecting much of the same area as the spotted owl, salmon recovery could impact even broader segments of the Pacific Northwest's economy. Dams for irrigation and/or power generation have damaged salmon habitat either by blocking or restricting upstream access for salmon entirely or by impeding young fish swimming down past the dams and their impoundments. Recovery of these listed populations might involve restrictions on hydropower generation, marine and lower river fish harvests, tribal fisheries, hatchery programs, irrigation, shipping, flood control, and other activities.

MARBLED MURRELET

The California, Oregon, and Washington population of the marbled murrelet, a small seabird, was listed on October 1, 1992, as threatened. Much of the murrelet's habitat is encompassed within the habitat of the spotted owl. The controversy surrounding the listing of the marbled murrelet is an issue of classification. In listing a vertebrate in one part of its range but not another, it has to be shown that the population is distinct. Murrelets in Alaska and British Columbia are not listed.

## ISSUES

Members may want to discuss the following issues:

- 1) Secretary Babbitt wants to prevent future ESA related "trainwrecks" from occurring and he has called for a broader ecosystem approach to prevent species from having to be listed. What are the FWS and the NMFS doing to accomplish this goal? What provisions are included in the Act that allow the FWS and the NMFS to take a broader approach to protecting species?
- 2) Public participation is an important component in ensuring that the Act works. How is the public involved and informed about decisions made under the ESA?
- 3) Recently, in the case of the California Gnatcatcher, a special rule, the 4(d) rule was used. What is the 4(d) rule and is it likely to be used more often in the future?
- 4) Section 10 allows private landowners, through the preparation of Habitat Conservation Plans (HCPs), to participate in the conservation of species. What are HCPs, how many of them have been approved, where have HCPs been developed, and how do they relate to recovery plans?

\*\* Portions of this memorandum have been excerpted from Fish and Wildlife Service documents.

JOINT TESTIMONY OF MICHAEL SPEAR, ASSISTANT DIRECTOR FOR  
ECOLOGICAL SERVICES, UNITED STATES FISH AND WILDLIFE SERVICE,  
DEPARTMENT OF THE INTERIOR, AND PATRICIA MONTANIO, CHIEF,  
PROTECTED SPECIES DIVISION, NATIONAL MARINE FISHERIES SERVICE,  
DEPARTMENT OF COMMERCE, BEFORE THE COMMITTEE ON MERCHANT  
MARINE AND FISHERIES, REGARDING AN OVERVIEW OF THE ENDANGERED  
SPECIES ACT

May 27, 1993

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Mr. Chairman, I am Michael Spear, Assistant Director for Ecological Services of the United States Fish and Wildlife Service, Department of the Interior. I am here today with Patricia Montanio, Chief of the Protected Species Division of the National Marine Fisheries Service, Department of Commerce. We are accompanied by John Fay, Chief of the Branch of Recovery and Consultation in the Fish and Wildlife Service's Endangered Species Division, and Phil Williams, National Sea Turtle Coordinator of the National Marine Fisheries Service. We are pleased to have this opportunity to provide the Committee with an overview of the Endangered Species Act.

Background -- The Federal government has been involved in the conservation of endangered species for over 25 years. The original Endangered Species Preservation Act was passed in 1966 and amended into the Endangered Species Conservation Act in 1969. In 1973, the Endangered Species Act was passed in substantially the form it retains today, despite significant amendment in 1978, 1979, 1982 and 1988. The Act's current authorization expired in 1992.

As originally passed, and as it has grown through amendment and interpretation over the years, the Act embodies a fairly comprehensive approach to maintaining species diversity in the United States and elsewhere. It is doubtful that anyone anticipated in 1973 what a large, complicated and sometimes contentious job this would become. However, there has been a continuing underlying commitment throughout society and its various institutions that the goal of protecting species is important for the Nation.

Section 2, Findings, Purposes, and Policy -- The Act finds that human activities have caused the extinction of some species and put the survival of other species at risk, that these species are of value, that the United States has committed itself through several treaties to the conservation of species, and then states its purpose very clearly: the maintenance of endangered and threatened species and the ecosystems upon which they depend.



The latter element of concern that goes beyond a narrow focus on species is particularly significant. The means it employs are various and innovative, including the declared policy that all parts of the Federal government shall seek to conserve endangered and threatened species and are to use their existing authorities to further the purposes of the Act.

Section 3, Definitions -- The Act employs a good deal of specialized vocabulary. Terms such as "endangered", "threatened", "species", and "critical habitat", which have special meanings under the law, are defined in section 3. It is often important to consult these definitions in interpreting other provisions of the Act to ensure that such "terms of art" are properly understood. We will revisit several of these definitions in discussing the remainder of the Act.

Section 4, Listing -- Basic to the conservation of species at risk of extinction is a process for ascertaining those species in need of attention. Section 4 of the Act addresses this need and assigns the task to the Secretaries of Interior and Commerce, with operational authority delegated to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. The responsibilities and authorities of the Secretaries are very broadly framed as the determination whether "... any species is an endangered species or a threatened species ..."

Changes to the list are accomplished through a rulemaking process involving proposal, public comment, and adoption of a final rule. In fact, rules that are adopted under section 4 have to comply with procedural requirements specified by the Act in addition to the ordinary requirements of the Administrative Procedure Act.

In addition to the broad charge to the Federal agencies to assess the status of species, the Act provides a process for the public to petition for a species to be listed, and it makes the agencies accountable to petitioners in very specific ways. Some definitions from section 3 are useful in understanding this assessment phase:

"Species" means any species or subspecies of plant or animal, and in the case of vertebrate life-forms includes "any distinct population segment ... which interbreeds when mature."

"Endangered species" means a species in danger of extinction throughout all or a significant portion of its range.

"Threatened species" means a species likely to become endangered in the foreseeable future throughout all or a significant portion of its range.

The Act provides that the Secretary shall make listing decisions "solely on the basis of the best scientific and commercial data available to him ..." In other words, no economic or social impact data may be used in making a listing decision.

Section 4, Critical Habitat -- When one of the administering agencies places a species on the threatened or endangered list, section 4 requires that it specify, "to the maximum extent prudent and determinable," the species' critical habitat. If critical habitat is not considered determinable at the time a final rule is adopted to list a species, the agency must designate critical habitat "to the maximum extent prudent" within one additional year. Once again, the definition in section 3 is important:

Critical habitat is defined as the specific areas within the geographical area occupied by a species at the time of listing within which are found those physical or biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protection, as well as areas outside the range of the species which are essential to its conservation.

"Conservation" means the use of all methods and procedures necessary to bring a species to the point which the protective measures of the Act are no longer necessary. "Conservation" is therefore synonymous with "recovery".

A designation of critical habitat may imply not only rather specific knowledge of the habitat needs of a species, but also an idea of what would be needed in the way of habitat protection and management to bring about the species' recovery.

One additional element has to be understood in connection with the designation of critical habitat. The 1978 amendment that required designation to the maximum extent prudent also required an examination of the economic and other relevant impacts of the designation above and beyond the impacts of listing, and allowed areas to be excluded from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, unless exclusion would lead to the extinction of the species.

There are inherent difficulties in applying this framework. In addition, recall that economic data may not be considered in making a listing decision, but must be developed and considered while the administering agency is concurrently making a determination about critical habitat designation. Both decisions may be incorporated in the same rulemaking, but must remain somewhat independent of one another. Both also need to be supported by adequate administrative records.

Keeping faith with these requirements is a complex undertaking.

Section 4, Recovery Plans -- Once a species has been placed under the Act's protection, a variety of protective measures become available, including: (1) the requirement that a recovery plan be prepared for any listed species likely to benefit from the effort, and (2) authorization to appoint a recovery team, which is exempt from compliance with the Federal Advisory Committee Act.

A recovery plan establishes recovery goals and objectives, as well as an implementation schedule and estimate of costs. Plans are also required to be subjected to public review before being adopted or revised. It is important to note that a recovery plan is not self-implementing, but amounts to a set of recommendations that if followed are believed likely to provide for a species' long-term survival.

If possible, a plan is expected to define a recovery goal that would allow the species to be removed from the lists and set out the means of achieving that goal.

Section 5, Land Acquisition and Section 6, State Grants -- Section 5 provides authority to acquire land for the benefit of endangered and threatened species, and section 6 establishes a Federal cost-sharing grant program for State governments undertaking endangered species conservation.

Section 7, Consultation -- One of the most innovative and important provisions of the 1973 Act was section 7, which implements the policy statement of section 2 by enlisting all Federal agencies in support of conserving endangered species. Section 7(a)(1) directs agencies to carry out programs for the conservation of endangered and threatened species and Section 7(a)(2) requires them to ensure that the actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or to destroy or adversely modify critical habitat.

Because of the wide range of Federal authorities and the vast amount of land and water administered by Federal agencies, these provisions have been extraordinarily important in promoting conservation. To ensure compliance with these standards, agencies must consult with the Fish and Wildlife Service or National Marine Fisheries Service on actions that may affect listed species or critical habitat.

Consultation leads to a biological opinion as to whether the action under consideration is likely to jeopardize listed species or adversely modify critical habitat. If the conclusion is "jeopardy", reasonable and prudent alternatives are provided that would avoid jeopardy. The opinion must also

address any taking of a species that might occur incidental to the action and prescribe means to minimize impacts.

A short paragraph when it was passed in 1973, section 7 has grown exponentially through subsequent amendments so that it now encompasses lengthy procedural requirements governing the consultation process and also a requirement to confer on actions affecting species proposed for listing and areas proposed for designation as critical habitat. Conferencing provides interim consideration for species or habitat proposed for protection.

Section 7, Exemption -- Section 7 also contains an elaborate but little-used process that allows a committee largely composed of Cabinet-level officials to exempt an agency's action from the duty to avoid jeopardy to a species or adverse modification of critical habitat.

This is the only part of the Act that provides for explicit balancing between the survival of a species and the economic and social cost of its conservation. That the Act invests the authority to allow a listed species to be jeopardized or possibly become extinct with a group at this level is a measure of the seriousness it accords these matters.

Section 8, International Cooperation and Section 8A, Convention Implementation -- Section 8 provides general encouragement for the United States to assist other countries in species conservation by making funding and personnel available. Section 8A establishes the mechanisms for U.S. implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The Convention is the principal international agreement controlling and regulating trade in endangered or potentially endangered species.

Section 9, Prohibitions -- Most straightforward, section 9 of the Act prohibits "taking" of endangered animals. Taking is broadly defined to include not only killing or wounding, but "harming and harassing."

In another interesting distinction among the different classes of species covered by the Act, taking of endangered plant species is not prohibited. Rather, beginning in 1979, a set of prohibitions have been applied in increments to plants. Currently, the Act prohibits the removal and reduction to possession or malicious damage or destruction of endangered plants in areas under Federal jurisdiction and elsewhere prohibits collection, damage, or destruction only when it also violates State law or occurs in the course of a violation of State criminal trespass law.



For reasons that are not based in science, the current law treats plants differently and less protectively than it does animals.

Also very straightforward are the trade provisions of section 9, which apply comparably to plants and animals and prohibit import, export, and interstate trade in endangered species or products derived from them.

There is a significant legal distinction between threatened and endangered species with respect to the Act's prohibitions. This difference provides a measure of administrative flexibility. The Act's general prohibitions are applied by statute for endangered species but not for threatened species. Regulations must be established for threatened species that the Secretary deems necessary to provide for the conservation of the species. Regulations may be as restrictive as the Section 9 prohibition for endangered species, or may be less restrictive if the full range of protection is not believed to be needed.

Secretary Babbitt's recent proposal for a special rule for the California gnatcatcher is an example of a section 9 regulation for threatened species.

Section 10, Permits -- Permits can be issued that allow a taking, import, and export under certain circumstances, including those necessary to carry out scientific research or enhancement activities. Permits can also be issued to allow taking that occurs incidental to otherwise lawful activities conducted in accord with an approved conservation plan. The latter "incidental taking" permit mechanism holds promise for easing conflict between endangered-species conservation and private activities. (Taking incidental to Federal actions is authorized under section 7.)

The process of permitting "incidental taking" is significantly different than the one that applies under section 7 for Federal agency actions. However, the protections afforded endangered and threatened species are similar.

Section 11, Penalties and Enforcement -- This section sets the maximum penalties that may be applied for violations of the Act, including civil fines up to \$25,000 and criminal penalties that may include fines up to \$50,000, imprisonment for up to 1 year. Vehicles, vessels, and other equipment involved in a violation may also be subject to seizure.

Section 12, Endangered Plants -- When the 1973 Act was passed, it marked the first Federal statutory authority to protect plant species at risk of extinction. Because there was not much known at the time about the conservation status of plants, Congress commissioned a report on the subject from the

Smithsonian Institution. The report principally took the form of a list of some 3000 plant species native to the U.S. believed to be endangered or threatened. The Smithsonian list was the cornerstone of further activities on behalf of plants, and the notion of assembling comprehensive lists of candidate species has subsequently been incorporated as an integral part of the Act's implementation.

This concludes my overview of the provisions of the Act. I would be pleased to respond to any questions the Committee may have.

TALKING POINTS

## ECONOMICS AND THE ENDANGERED SPECIES ACT

Karl Gleaves, Attorney Advisor, General Counsel, Fisheries, National Oceanic and Atmospheric Administration, Silver Spring, Maryland; J.D. University of Wisconsin Law School, 1976; M.A. Political Science, University of Wisconsin, 1972; B.A. University of Iowa, 1970.

Introduction

The Endangered Species Act of 1973 (ESA) is one of our nation's strongest and most controversial environmental laws. Often the controversy is framed in terms of "species versus economics." For example, there have been numerous debates on topics such as:

- the snail darter versus the Tellico dam project;
- sea turtles versus the economic impacts on shrimp fishermen and the shrimp industry;
- the northern spotted owl versus thousands of timber-related jobs; and
- Pacific salmon in the West and Northwest versus significant economic consequences for utilities, farmers and other water users.

My comments focus on the role of economics in the ESA. A commonly held view is that the ESA precludes consideration of economic factors. I would suggest that the common impression is overly simplistic, and that it is legitimate and appropriate to consider economics at certain stages of the ESA process. You have already heard a general description of the ESA. I will review six types of determinations or actions that may occur as a part of the ESA process. In each case, the permissibility of considering economic factors at that stage is analyzed, and if economics can be considered, the importance of economics in that decision is summarized.

1. Proposed and Final Listing Decisions

Typically, the ESA process begins when the National Marine Fisheries Service (NMFS) or the Fish and Wildlife Service (FWS) begins to review the status of a species, either on its own initiative or in response to a petition that presents substantial information.

Economics are not relevant and cannot be considered as a part of the listing process. These determinations shall be made "solely on the basis of the best scientific and commercial data available . . . ." The legislative history of the 1982 amendments is explicit that "economic considerations have no relevance to determinations regarding the status of a species . . . ."2

Consequently, the listing process is exempt from various laws and executive orders that otherwise would require an economic analysis.<sup>3</sup>

## 2. Proposed and Final Critical Habitat Designations

Under the ESA, critical habitat should be designated at the time of the final listing of a species, but can be delayed up to one year under certain circumstances. The first step in designating critical habitat consists of determining the physical and biological features that are essential to the conservation of the species and determining whether these features may need special management considerations and protections.

Critical habitat also involves a second step. Economics are to be considered in this decision. "The Secretary shall designate critical habitat . . . on the basis of the best scientific data available after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."<sup>4</sup>

While critical habitat designations must involve the consideration of economic impacts, evaluating the extent of these economic impacts is problematic. As interpreted by NMFS and FWS, the critical habitat designation, by itself, may have little direct economic impact. Most of the economic consequences are derived from listing the species and are not directly attributable to the critical habitat designation.

## 3. Jeopardy Determinations and the Mandate to Avoid Jeopardy

Once a species is listed under the ESA, the mandatory provisions of section 7(a)(2) apply. Federal agencies are required to ensure that their actions are not likely to jeopardize the continued existence of listed species. Similarly, once critical habitat is designated, agencies must avoid the destruction or adverse modification of these areas. The no-jeopardy obligation and the duty to avoid destruction or modification of critical habitat are to be carried out in consultation with NMFS or FWS. In making determinations under section 7(a)(2), an agency must use "the best scientific and commercial data available."<sup>5</sup> Consequently, NMFS and FWS do not consider economics in issuing biological opinions or making jeopardy determinations as a part of the section 7 consultation process.

The Supreme Court decision in the Tellico dam case indicated that economic consequences are irrelevant to the section 7 mandate to avoid jeopardy. "The value of this genetic heritage is, quite literally, incalculable."<sup>6</sup> The Court went on to state:



Quite obviously, it would be difficult for a court to balance a sum certain -- even \$100 million -- against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not.<sup>7</sup>

Thus, economic factors are irrelevant in making jeopardy determinations under section 7(a)(2); likewise, the no-jeopardy mandate does not provide for the consideration of economic factors, except in the extraordinary situation where an exemption is sought from the Endangered Species Committee.

#### 4. Alternatives to Avoid Jeopardy and the Duty to Conserve

As a practical matter, economic considerations are important in the evaluation of alternatives that are acceptable under the ESA. Normally, economic factors are considered when an agency proposes an action, and if required, the action agency will prepare National Environmental Policy Act (NEPA) documents accompanied by economic documents. During consultation with NMFS and FWS, the impact of the proposed action on endangered and threatened species and their habitat is evaluated, and sometimes, the proposed action is modified to mitigate adverse impacts (wherein economic factors are often considered). While language in some earlier cases suggested the duty to conserve species under section 7(a)(1) imposed a stringent obligation, a more recent decision indicates that there is a large degree of latitude in fulfilling this duty.<sup>8</sup> Provided the agency proposing the action complies with the no-jeopardy mandate and does not adversely modify critical habitat, there is considerable discretion in choosing a preferred alternative, and economics or other factors may be considered in making this choice.

If a biological opinion concludes that an agency action is likely to jeopardize a listed species or to destroy or adversely modify critical habitat, the Secretary of Commerce or Secretary of the Interior must suggest "reasonable and prudent alternatives" to avoid this conclusion. Regulations define "reasonable and prudent alternatives" as alternative actions that are "economically and technologically feasible."<sup>9</sup> In fact, jeopardy opinions are relatively infrequent. But even with a jeopardy opinion, nothing restricts or prohibits the consideration of economic costs to the agency proposing the action or permit applicant in selecting among the acceptable reasonable and prudent alternatives.

#### 5. The Endangered Species Committee and the Exemption Process

In response to TVA v. Hill, the 1978 ESA amendments created an Endangered Species Committee and provided a mechanism for obtaining an exemption from the no-jeopardy mandate of

section 7.<sup>10</sup> Economic factors are considered in the exemption process.

The exemption process begins upon application to either the Secretary of Commerce or of the Interior for an appeal to the Endangered Species Committee, following completion of the normal consultation process. This Committee, sometimes referred to as the "God Squad," consists of the Secretaries of Agriculture, Army, and the Interior, the Chairman of the Council of Economic Advisers, the Administrator of EPA, the Administrator of NOAA, and an individual to represent the affected state. Five members must vote in person to allow for an exemption.

Before a waiver may be granted, the Endangered Species Committee must determine on the record that: first, "there are no reasonable and prudent alternatives;" second, "the benefits of such action clearly outweigh" an alternative course of action that would preserve the species or its critical habitat, and "the action would be in the public interest;" and third, "the action is of regional or national significance."<sup>11</sup> After making those determinations, the Committee is required to establish reasonable mitigation and enhancement measures to minimize adverse effects on the species and habitat concerned.<sup>12</sup>

Since the creation of the exemption process, the Endangered Species Committee has voted in only three cases: the Tellico Dam project, the Grayrocks dam project, and, most recently, on certain timber sales in the Pacific Northwest. An exemption was granted for the Grayrocks project and for a limited number of timber sales. Legislative action authorized completion of the Tellico project. Recently, the Bureau of Land Management has announced its decision not to go forward with the exempted timber sales in the Pacific Northwest.

Because the exemption process has been used so rarely, there is some uncertainty concerning how various laws and executive orders requiring an economic evaluation would apply to this process.

#### 6. Recovery Plans and Management Actions

The role of economics in the recovery planning process is at a minimum complex, and in some cases, confusing. To begin with, it is important to distinguish between the development of and content of a recovery plan and the implementation of specific management measures to achieve the plan's goals. Timing is not specified by statute although certain priorities are established; for example, a high priority is specified for "species that are, or may be, in conflict with construction or other development projects or other forms of economic activity."<sup>13</sup>

Economic considerations are relevant to the recovery planning process; however, it is important to distinguish between the

development and content of a recovery plan and the implementation of specific management measures to achieve a plan's goals. With respect to the former, the Conference Report on the 1988 Amendments states that "the development and content of recovery plans will continue to be based solely on biological considerations."<sup>14</sup>

Recovery plans are to include "site-specific management actions" and "estimates of the time and costs required to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal."<sup>15</sup> NMFS or FWS is responsible for the development and implementation of a recovery plan for a listed species, although the responsibility for many of the specific management actions and conservation measures may rest with other agencies, with NMFS or FWS acting in a consulting capacity.

A recovery plan is subject to public notice and an opportunity for public comment prior to final approval, but whether a complete economic analysis is required or whether various laws and executive orders would apply is unresolved. The answer probably depends on the nature of the plan. If the plan itself includes only research objectives, goals, and general recommendations, most of the requirements and procedures of these various executive orders and acts may be inapplicable.

Implementation of management actions, especially regulatory actions, probably would need an economic analysis and would be subject to various executive orders and statutes requiring the preparation of this type of analysis. The ESA does not specify a schedule for implementing management measures. Management actions could be taken as a part of the recovery planning process, or under other statutory authority.

In general, consideration of economics and other factors may be most important and relevant during the recovery planning process and when specific management and conservation measures are being implemented. While the mandate to avoid jeopardy establishes a legal minimum, recovery planning and conservation management options involve more latitude. The consideration of various options should involve the evaluation of broader social and economic costs and benefits as well as the narrow evaluation of the impact on the listed species.

#### Summary of Legal Constraints and Considerations

Economic considerations are not relevant to determinations that are part of the ESA listing process. Likewise, economic impacts are not considered in making jeopardy or adverse modification determinations; and, except in extraordinary circumstances, economic considerations may not be used to excuse compliance with the duty to avoid agency actions that are likely to jeopardize

the continued existence of listed species or result in the destruction or adverse modification of critical habitat. In the rare case where an application for an exemption is submitted to the Endangered Species Committee, economic factors are considered.

Three other ESA actions may involve the consideration of economic consequences: (1) designating critical habitat (although the relevance and importance of economics at this stage of the ESA process may be limited); (2) evaluating options for avoiding jeopardy; and (3) developing and implementing recovery plans.

Economic considerations are not ignored by the ESA. The role of economics in the ESA, while circumscribed in some instances, is an important part of evaluating projects that may affect listed species or their habitat, and is valuable in the implementation of recovery actions and management controls.

Endnotes

1. §4(b)(1)(A) (emphasis added); "solely" was added by the 1982 Amendments, Pub. L. 97-304, 102 Stat. 2306. The use of the "word 'commercial' is not intended, in any way, to authorize the use of economic considerations in the process of listing a species." H.R. Rep. No. 597, 97th Cong., 2d Sess. 19-20 (1982). The term is used to allow for the use of trade data. Id. The legislative history of the 1982 amendments is clear that the purpose of these amendments is to ensure that "decisions in every phase of the process pertaining to the listing or delisting of species are based solely on biological criteria and to prevent non-biological considerations from affecting such decisions." Conference Report, H.R. Rep. No. 835, 97th Cong., 2d Sess. 20 (1982).

2. Conference Report, H.R. Rep. No. 835, 97th Cong., 2d Sess. 20 (1982) (emphasis added).

3. See, e.g., Exec. Order No. 12291, 46 Fed. Reg. 13,193 (1981), reprinted in 5 U.S.C.A. § 601 (Supp. 1992); Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1988); Paperwork Reduction Act of 1980, as amended, 44 U.S.C. §§ 3501-3520 (1988).

The Conference Report states: "[T]he economic analysis requirements of Executive Order 12291, and such statutes as the Regulatory Flexibility Act and the Paperwork Reduction Act, will not apply to any phase of the listing process." Conference Report, H.R. Rep. No. 835, 93rd Cong., 2d Sess. 20 (1982).

Similarly, listing actions should not subject to the requirements of Exec. Order No. 12612, 52 Fed. Reg. 41,685 (1987), reprinted in 5 U.S.C.A. § 601 (Supp. 1992). But see Exec. Order No. 12630, 53 Fed. Reg. 8,859 (1988), reprinted in 5 U.S.C.A. § 601 (Supp. 1992)."

4. §4(b)(2) (emphasis added).

5. §7(a)(2).

6. TVA v. Hill, 437 U.S. at 178, (citing H.R. Rep. No. 412, 93rd Cong.).

7. TVA v. Hill, 437 U.S. at 188-189.

8. Pyramid Lake Paiute Tribe v. U.S. Dept. of the Navy, 898 F.2d 1410 (9th Cir. 1990). See also Carson-Truckee Water Conservation Dist. v. Watt, 549 F. Supp. 704 (D. Nev. 1982), modified 741 F.2d 257 (9th Cir. 1984), cert. denied, 470 U.S. 1083 (1985); and Nat'l Wildlife Fed'n v. Nat'l Park Service, 669 F. Supp. 384 (D. Wyo. 1987).



9. 50 C.F.R. §402.02 (1991).
10. §7(e)-(p). See 50 C.F.R. Parts 450-453 (1990).
11. §7(h)(1)(A)(i)-(iii).
12. §7(h)(1)(B).
13. §4(f)(1)(A).
14. H.R. CONF. REP. No. 100-928, 100th Cong., 2d Sess (1988), printed in 134 CONG. REC. H7,719 (1988). See also floor debate concerning Amendment 2724, a proposal to require a comprehensive economic analysis as a part of a new or revised recovery plan. 134 CONG. REC. S10,165-69 (1988). In this floor debate, Senator Mitchell argued:

It is especially critical to the scientific credibility of the endangered species program that decisions about when to delist a species as recovered be based on the biological status of the species, not on how much it will cost to restore its numbers or whose economic interests it may affect.

. . . .  
It is essential to the act's integrity that recovery goals for the number of individuals or populations needed to ensure a species existence be based solely on the best available scientific data.

134 CONG. REC. S10,166 (1988). Amendment 2724 was withdrawn.

15. §4(f)(1)(B)(i) and (iii) (emphasis added); it is not clear whether these "costs" are limited to the actual cost of implementing specific measures or could include indirect costs and expenses resulting from recovery efforts.



UNITED STATES DEPARTMENT OF COMMERCE  
**National Oceanic and Atmospheric Administration**  
 NATIONAL MARINE FISHERIES SERVICE  
 1335 East-West Highway  
 Silver Spring, MD 20910  
 THE DIRECTOR

JUN 30 1993

The Honorable Gerry E. Studds  
 Chairman, Committee on Merchant Marine  
 and Fisheries  
 House of Representatives  
 Washington, D.C. 20515-6230

Dear Mr. Chairman:

Thank you for your letter on behalf of  
 Congresswoman Unsoeld, regarding questions submitted  
 for inclusion in the record of the hearing that the  
 Subcommittee on Environment and Natural Resources held  
 on the Endangered Species Act on May 27, 1993.

Enclosed is a copy of our responses to these  
 questions. We appreciate your interest in this matter.

Sincerely,

Nancy Foster, Ph.D.  
 Acting Assistant Administrator  
 for Fisheries

Enclosure

THE ASSISTANT ADMINISTRATOR  
 FOR FISHERIES



Answers to questions submitted by Congresswomen Unsoeld

In your testimony, you referred to the new definition of "species" as used by the NMFS.

a. Is this the same definition used by other federal agencies, or do different agencies use different definitions?

Under the ESA, "species" is defined to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." "Species" is used in a more expansive way in the ESA than biologists or taxonomists generally use the term. Use of this language established that the scope of the ESA extends beyond the traditional biological definition of species to include smaller biological units.

Because the ESA does not explain how population distinctness shall be evaluated or measured, the National Marine Fisheries Service (NMFS) published a final policy on applying the definition of species under the ESA to Pacific salmon on November 20, 1991. Under this policy, a stock of Pacific salmon will be considered a distinct population, and hence a "species" under the ESA, if it represents an evolutionarily significant unit (ESU) of the biological species. A stock must satisfy two criteria to be considered an ESU: (1) It must be substantially reproductively isolated from other conspecific population units; and (2) It must represent an important component in the evolutionary legacy of the species.

NMFS' policy developed as a result of a 1990 meeting with the U.S. Fish and Wildlife Service. The intent of the meeting was to develop a joint policy. This has not materialized yet, but because NMFS was being petitioned to list several Pacific salmon populations, NMFS needed a policy to use right away.

b. A criteria of your new definition is "evolutionarily significant." Can you provide an example of an animal, or population or subpopulation of animals, that is not "evolutionarily significant?"

"Evolutionarily significant" means "of ecological/genetic importance to the species as a whole." The intent of this criterion is to conserve key genetic building blocks for the species so that the process of evolution can go on by itself. Without conservation of these building blocks, the potential for evolution would be limited, resulting in a greater risk of the population not being able to respond to environmental change. Extinction of the population would represent a significant loss to the ecological/genetic diversity of the species.

An example of an evolutionarily significant population is the Snake River sockeye salmon, which, among all sockeye salmon populations, demonstrates the longest freshwater migration

(900 miles) and spawns at the highest elevation (6,000 feet). Lower Columbia River coho salmon and Illinois River winter steelhead are two examples of populations that are not considered by NMFS to be evolutionarily significant.

In the case of lower Columbia River coho salmon, hatchery outplanting, combined with the high percentage of coho salmon from hatcheries spawning in the wild, likely resulted in significant hatchery introgression of the indigenous population through the lower Columbia River. Further, increased hatchery production, beginning in the 1960s, allowed harvest rates to remain high, and wild lower Columbia River coho salmon, already depressed in abundance, were not afforded an opportunity to recover.

There was insufficient evidence to demonstrate that the Illinois River winter steelhead by themselves represent an ESU, and hence a "species" under the ESA. In several life history characteristics, this population differed from the Rogue River population, but it was similar to other coastal populations. However, NMFS believes that Illinois River winter steelhead are undoubtedly part of a larger ESU whose extent has not yet been determined. NMFS therefore initiated a status review of all coastal steelhead populations in California, Oregon, and Washington and will make a determination of ESU(s) in these areas and determine whether or not to propose listing under the ESA for any identified ESU.



NATIONAL ASSOCIATION  
OF REALTORS®

*The Voice for Real Estate®*

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June 18, 1993

The Honorable Gerry Studds  
Chairman  
Merchant Marine and Fisheries Committee  
Office Building  
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the NATIONAL ASSOCIATION OF REALTORS®, I am writing to request that this statement be included in the record for the May 27, 1993, hearing on the reauthorization of the Endangered Species Act. The Association supports a reauthorization of the Act that recognizes socio-economic considerations and insures that compensation will be provided in cases where the value of private property has been unduly diminished by government action.

The NATIONAL ASSOCIATION OF REALTORS® believes in the fundamental right of all private property owners working through local government to determine the highest and best use of their land. Properly conducted programs of land preservation and historic preservation which attempt to protect aquifers, agricultural lands, wetlands, scenic vistas, natural areas, historic properties and open space, may have a positive effect on the environment in towns, counties, and municipalities. However, in establishing land use laws and regulations for the purpose of protecting these resources, the cost of the benefits to the general public shall be borne by the general public.

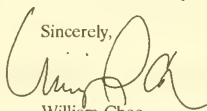
In addition, we support the concept that governments shall not arbitrarily infringe on the basic right of the individual to acquire, possess and freely transfer real property, and shall protect private property rights as referred to in the 5th and 14th Amendments of the United States Constitution.



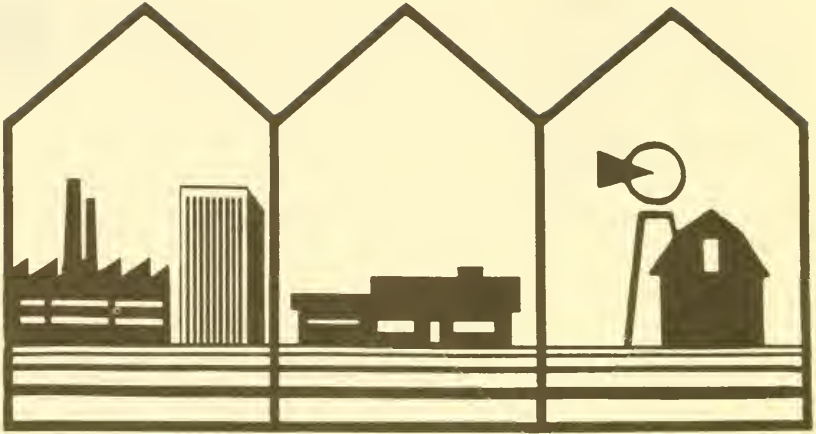


We maintain that planning for the classification and use of land must adequately consider the needs of housing, agricultural, commercial and industrial growth, as well as quality of life and a healthy local economy. With that in mind, we urge you to consider not only the environmental impact of the reauthorization of the Act, but also the human impact.

Sincerely,

A handwritten signature in dark ink, appearing to read 'William Chee', with a stylized, flowing script.

William Chee  
President



Statement of the  
NATIONAL ASSOCIATION OF REALTORS®

*The Voice for Real Estate™*

THE WORLD'S LARGEST TRADE ASSOCIATION

STATEMENT OF

THE NATIONAL ASSOCIATION OF REALTORS®

SUBMITTED TO THE HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE

THE REAUTHORIZATION OF THE ENDANGERED SPECIES ACT

MAY, 1993

## STATEMENT OF

THE NATIONAL ASSOCIATION OF REALTORS®

SUBMITTED TO THE HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE

THE REAUTHORIZATION OF THE ENDANGERED SPECIES ACT

MAY, 1993

INTRODUCTION

Thank you for the opportunity to submit the NATIONAL ASSOCIATION OF REALTORS® comments for the record, on the Reauthorization of the Endangered Species Act. The NATIONAL ASSOCIATION OF REALTORS®, comprised of nearly 750,000 members involved in all aspects of the real estate industry, has a keen interest in the Endangered Species Act.

The association believes that development should be encouraged, as it is a stimulus to the economy, increases the tax base, provides places to live and work, and offers opportunities that would not otherwise exist. However, we also realize the responsibility we have to educate and work with local, state, and federal government officials to develop responsible growth planning that is equitable and considers the divergent needs of transportation, housing, agriculture, commercial, industrial, and environmental concerns.

NAR COMMENTS AS THEY RELATE TO ENDANGERED SPECIES

As the industry which assists in making the American dream of owning a home become a reality, we are aware of the critical role of environment in preserving America's quality of life, and we want to make certain that those lands that contain endangered species should be designated as

such. These areas not only play a major role in our environment, but they are also a selling tool utilized by our membership because they can in some cases increase property values and encourage and enhance both the ownership of environmentally sensitive lands as well as stewardship of these important lands for our nation.

#### NAR CONSIDERS PUBLIC INPUT AND AN APPEAL PROCESS IMPERATIVE IN DETERMINING THE PROPER WAY TO DESIGNATE LANDS

It is crucial that public input be gathered on any and all issues that determine the overall land use policy for the nation. In addition to comments, we would recommend that the government seek public input through public meetings, open forums, and utilizing groups that may have had first hand knowledge in the development of projects having to do with the issue at hand.

#### GENERAL COMMENTS AND RECOMMENDATIONS NEEDED FOR A SOLUTION TO THE ENDANGERED SPECIES ISSUE

- o NAR is supportive of a legislative/regulatory solution which would include some form of prioritization or ranking so that we can protect the most valuable of our lands, while allowing private landowners of less ecologically sensitive properties the right to develop lands as they see fit, within local planning and zoning parameters.
- o NAR recommends that all governmental entities involved and private property owners be notified of any endangered species designations. In addition, we believe that a regulatory process needs to be implemented allowing citizens the right to challenge the appropriateness of endangered species designations.

o NAR recognizes the vital necessity of professional competency to meet the challenges of real estate practice in an increasingly sophisticated and complex society. Professionalism in real estate through education and training is one of the primary objectives of the association. We encourage the government to work with our association to promote public awareness of the value of endangered species. In turn, with our many local boards and state associations, the REALTORS® can provide the government with information as to how the regulation will impact real property owners.

### **PRIVATE PROPERTY RIGHTS**

The NATIONAL ASSOCIATION OF REALTORS® has worked for years to encourage a balanced approach to environmental protection that accommodates the important needs for both conservation as well as economic opportunity and vitality. To balance the efforts of government to serve the public well being by controlling pollution and protecting natural resources with the economic and property rights secured by the Constitution, we believe that the cost of the benefits to the general public achieved by such regulation should be borne by the beneficiaries--the general public. We oppose those aspects of environmental and natural resource legislation that amount to uncompensated condemnation of private property through government action. It is essential that the rights of private property owners be fully recognized in local, state, and federal programs and laws.

To prevent other property owners from becoming embroiled in years of litigation and spending the huge sums of money necessary to do so, federal endangered species legislation/regulation should require the regulating agency to expressly consider the implications of permit denials on private property rights. In particular, the law should require that any wholesale denial of use be carefully analyzed to determine the extent of compensation to be provided to the





affected property owner. Perhaps just as importantly, federal endangered species regulatory legislation should require that complete denials of use be clearly justified and imposed only where the affected area is of such extreme ecological significance and vulnerability as to justify such draconian action. Regulation should require the regulator to permit beneficial uses of lands that contain endangered species which do not present a real and significant threat to substantial public interests. Preservation of important species can also be accomplished by providing financial incentives for property owners to leave species on their land undisturbed. This would also relieve builders, for example, from unfairly bearing the cost of environmental improvement or protection, which cost is in any event generally passed on to homebuyers.

The NATIONAL ASSOCIATION OF REALTORS® strongly believes that federal regulation is necessary to preserve the fundamental right of all private property owners, working through local governments, to determine and enjoy the highest and best use of their land. To be sure, NAR recognizes that the application of some restrictions on property use serves the interests of all, but NAR believe that all citizens have the right to acquire and use real property with the confidence and certainty that the value of their property will not be unduly diminished or jeopardized by governmental action at any level without the owner's express consent.

It is important to note that our Association supports H.R. 385, which was introduced by Rep. Gerald Solomon. This legislation requires federal agencies to establish procedures to assess whether a pending rule or regulation may result in the taking of private property. It would also require agencies to avoid takings wherever possible.

**CONCLUSION**

NAR believes properly conducted programs of land preservation and historic preservation which attempt to protect aquifers, agricultural lands, wetlands, scenic vistas, natural areas, historic properties and open space may have a positive effect on the quality of life in towns, counties and municipalities. However, in establishing land use laws and regulations for the purpose of protecting these resources, the cost of the benefits of these programs to enhance our nation's resources should be paid for by the general public.

Current government real property acquisition practices have resulted in excessive amounts of private property being placed in the government estate. Federal property acquisition agencies have been authorized by Congress to acquire private property for parks, national forests, refuges and for other purposes, but have not been provided with the resources to promptly compensate landowners or adequately manage acquired lands.

The Fifth Amendment of the United States Constitution states that private property [shall not] be taken for public use without just compensation. This premise was one of the fundamental building tenets of our nation and, it should remain so today.

The NATIONAL ASSOCIATION OF REALTORS® and the nation support an endangered species policy that is environmentally sensitive, yet allows our nation to be economically competitive.

Thank you for the opportunity to express our views.



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